

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR _____
Appeals Court No. 2023-P-0482

NAHANT PRESERVATION TRUST, INC., et al.
Plaintiffs/Appellants

&

TOWN OF NAHANT
Intervenor-Plaintiff/Appellant,

v.

NORTHEASTERN UNIVERSITY
Defendant/Appellee

On Appeal from a Judgment of the
Essex Superior Court, Civil Action No.1977-cv-01211A

Consolidated With
Land Court, Case No. 19 MISC 0390/Sup. Ct. No. 2177-
cv-0186

PLAINTIFFS/APPELLANTS' APPLICATION FOR
DIRECT APPELLATE REVIEW

May 3, 2023

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INTRODUCTION AND REQUEST FOR DIRECT APPELLATE REVIEW

This case presents fundamental issues about the dedication to public use doctrine and Article 97 of the Amendments to the Massachusetts Constitution as outlined in Smith v. Westfield, 478 Mass. 49 (2017), and as applied to a uniquely scenic and historic property at the tip of East Point in Nahant, Massachusetts ("Property"). The issues are whether the trial court erred (1) in concluding that Northeastern University's ("NEU") allowance and encouragement of unrestricted public use of the Property for passive recreation and NEU's maintenance of the Property as a wildlife preserve for more than a half-century, along with other dedicatory statements by NEU, are insufficient to warrant a trial on NEU's intent to dedicate for public use, even though this Court's precedent is that allowance of such public use is "very strong evidence" of intent to dedicate and even though this Court left open in Smith whether such a long period of public use might be enough by itself to establish an intention to dedicate as parkland under Article 97; and (2) in concluding that acceptance of the land for public dedication requires use by members of the public who do not live in

Nahant, even though there is absolutely no Massachusetts precedent for such requirement and even though the summary judgment record showed public use for more than a half-century by both Nahant residents as well as non-residents. It is important that this Court resolve these hotly-disputed issues that involve legal precedent dating from the late 1800's and constitutional interpretation.

The public interest is very much at stake, because the public's enjoyment of the uniquely scenic and historic Property for more than a half-century has been abruptly cut off by NEU, who plans to raze the wildlife preserve used for passive recreation and wildlife observation and build in its place a 55,000 s.f. steel and glass structure in order to take private advantage of magnificent views of the Atlantic Ocean and nearby cliffs.

The public interest is also at stake because based on NEU's statements and conduct over the course of more than fifty years that it was maintaining the property as a wildlife preserve with public use for passive recreation, the Town of Nahant--the smallest town in Massachusetts--treated the property as protected open space in its planning documents for

nearly three decades and further designated the Property under its zoning bylaw as a protected Natural Resource District, and developed and dedicated a public park contiguous with the Property, protecting the entire East Point peninsula as contiguous public open space. The use of the Town's public park will be drastically and adversely impacted by NEU's development, unless this Court intercedes.

This Court's interpretation of Smith is essential to give guidance to lower courts, as there are other cases in progress involving dedication of public parklands and shorelands. The dedication to public use doctrine and Article 97 must continue to be interpreted broadly, as in Smith, in order to maximize preservation of the dwindling public access to parklands and shorelands throughout Massachusetts.

This is a particularly apt case for this Court to interpret Smith, given the compelling historic circumstances, the unique beauty of the Property, its unparalleled ecological significance, and its long history of public use. Starting in 1965-1966 when NEU first acquired the Property, NEU repeatedly and publicly stated that it would maintain and was maintaining the Property as a wildlife preserve or

sanctuary. NEU made this the centerpiece of its 1965 proposal to acquire the Property, for free, from the federal government. Consistent with its proposal, NEU actually maintained the Property as a wildlife preserve and open space for more than a half-century, and allowed the public at large to use the Property for that entire period, without restriction, for viewing the cliffs and ocean, star-gazing, fishing, walking, bird-watching and other passive recreation. Indeed, NEU trumpeted on its website for nearly a decade that it was maintaining the Property as a wildlife sanctuary.

The trial court, however, interpreted Smith in such a way as to conclude that (1) there was no triable issue as to NEU's intent to dedicate the Property to public use despite NEU's fifty-two year course of conduct and statements, and (2) the general public did not accept the dedication because only residents of Nahant and not of other Massachusetts municipalities used the property--which was legally and factually incorrect. Both of these conclusions involve issues of major public importance and erroneous interpretations of Smith which warrant this Court's direct review.

Smith affirmed that the long-established common law doctrine of dedication to public use remains alive and well in Massachusetts. Where a private owner makes manifest by unequivocal declarations or acts its intent to dedicate land to the use of the public, and the dedication is accepted by the public, the public obtains an irrevocable easement in the land. 478 Mass. at 59. "The dedication 'may spring from oral declarations or statements by the dedicator, or by those authorized to act in his behalf, made to persons with whom he deals and who rely upon them; or it may consist of declarations addressed directly to the public.'" Id., quoting Attorney General v. Onset Bay Grove Ass'n, 221 Mass. 342, 348 (1915) ("Onset Bay"). "No specific length of time is necessary; the acts of the parties to the dedication when once established complete it." Id., quoting Hayden v. Stone, 112 Mass. 346, 349 (1873). Public use "is competent, and often important, as bearing on the question of dedication, when that is in dispute; for if a man stands by, seeing the public use a way, permits it, and says nothing, it is very strong evidence to show an intention to dedicate." Hayden, 112 Mass. at 350. The easement belongs to the "general public", not

simply the residents of the particular city or town in which the land is located. Smith, 478 Mass. at 60. Where the land has been dedicated as parkland, under Article 97 any change in use must be authorized by the Legislature by a two-thirds vote. Id. at 60-61.

This Court held in Smith that the city of Westfield dedicated a parcel to public use as a park protected by Article 97 where it accepted Federal funds pursuant to a condition that it could not convert the playground on the parcel to a use other than public outdoor recreation without approval of the federal government. While considering "the totality of the circumstances," the Court held that the federal grant condition was the determinative factor, and that therefore it "need not determine whether it would have been enough to meet the clear and unequivocal intent standard that the land had been used as a public park for more than sixty years" 478 Mass. at 64.

The trial court's decision here calls the proper application of Smith and the long-established doctrine of dedication to public use into question. The trial court failed to consider the totality of circumstances of NEU's oral and written statements along with its half-century course of conduct, and failed to confront

the implications of the half-century of preservation of the property as open space with public access. It also committed clear error by applying an unprecedented test for acceptance of the dedication--use by other than Nahant residents--that is inconsistent with case law in Massachusetts and other jurisdictions.

Direct review by this Court is needed because the trial court's errors in misapplying Smith and Article 97, if not corrected, will substantially impede private, municipal and land trust efforts to preserve precious open space and wildlife habitats, as well as deprive the public of preservation of and access to a truly unique coastal property.

STATEMENT OF PRIOR PROCEEDINGS

In 2018, an expansionist NEU administration decided to abandon its fifty-two year maintenance of the wildlife preserve and open space used by the public. It proposed to raze the northeast portion of its land at East Point and build a 55,000 s.f. glass and steel building from which NEU and NEU alone could view the ocean and cliffs. NEU sued Nahant Preservation Trust, Inc. ("NPT") and twenty-seven citizens ("Appellants") in Land Court for a

declaration that it had not dedicated the Property to public use. NPT is a non-profit organization whose purpose is to preserve and maintain environmental and historical properties in Nahant. The Appellants sued NEU in Superior Court for *inter alia* a declaration that the Property was dedicated to public use and protected from development under Article 97.

The Land Court ruled that under the Massachusetts Constitution the Appellants were entitled to a jury trial on the dedication issues. It framed three issues under the dedication doctrine to be decided by a jury.

The cases were consolidated before a Superior Court judge who was specially assigned to also act as a Land Court judge. The Town of Nahant intervened on the side of Appellants in the consolidated action and also brought its own estoppel claim against NEU.

NEU moved for summary judgment on the dedication/Article 97 claims. Appellants opposed the motion on the grounds that there existed triable issues of fact as to all three issues reserved for jury trial. Their opposition brief, pursuant to Superior Court Rule 9A(b)(5)(iii)(B), set forth specific additional facts regarding NEU's fifty-two

year maintenance of the Property as a wildlife preserve and open space, and the public's fifty-two year use of the property for passive recreation, that warranted denial of the motion. ("Opposition", attached at Addendum, p. 113). Appellants submitted multiple sworn statements evidencing these additional facts and attesting to NEU's conduct and statements over the half-century of its ownership of the Property.

On September 20, 2022, the trial court issued a decision granting NEU's motion for summary judgment on the dedication/Article 97 claims. Add./81. The trial court held that Appellants did not have a reasonable expectation of prevailing on their claims. Its factual summary and legal analysis omitted discussion of many key facts relied upon by Appellants, including most importantly NEU's fifty-two year course of conduct in maintaining the Property as a wildlife preserve and open space and the public's unrestricted use of the Property for passive recreation over that same period.

The trial court entered separate and final judgment on the dedication/Article 97 claims but stayed assembly of the record for appeal until the

Town's estoppel claim was resolved. On January 19, 2023, the trial court issued summary judgment in favor of NEU on that claim. This appeal followed.

The trial court's Decision departs from this Court's precedents in several important respects. *First*, the trial court failed to consider the totality of circumstances of NEU's oral and written statements along with its half-century course of conduct. Indeed, the trial court failed to even mention NEU's fifty-two year course of conduct and the public's fifty-two year use of the Property in its legal analysis.

Second, the trial court ignored the unrebutted evidence that the Town of Nahant had reasonably relied on NEU's statements and actions by treating the Property as protected open space with public access in its Open Space Planning Reports over several decades; by zoning the Property as a protected Natural Resource District prohibiting development; and by developing Lodge Park next to the Property in order to take advantage of the open space, wildlife observation and scenic views afforded by NEU's preservation of the Property. These actions by the Town are relevant evidence of NEU's dedicatory intent; there is a strong

inference that NEU's dedicatory statements and conduct precipitated these actions by the Town. The trial court erred by utterly failing to mention these actions in its written decision, even though it acknowledged them as relevant during oral argument.¹

Third, the trial court erred by not reaching the question left unanswered in Smith, i.e. whether the half-century course of conduct by NEU and use by the public in and of itself, could be considered by a reasonable factfinder--here, a jury--as sufficient evidence of dedicatory intent. Case law from Massachusetts and other jurisdictions confirms that NEU's half-century of preservation of the Property as a wildlife preserve and open space and allowance of public use over that entire period, without more,

¹ The trial court stated: "So, you know, I have to tell you, Mr. O'Flaherty, that Mr. Lurie has a point about -- so my instinct initially was that the Trust and the Town pointing to all these things that were in their own documents really aren't helpful. That's what I was thinking because those are the Town's documents. It doesn't show Northeastern's intent. But, you know what? I think Mr. Lurie has a point and that is that why would they be saying all these things? . . . I think that when you start looking again in the light most favorable to the Town and Trust, beyond that time period, why is the Town saying these things in public documents?" May 20, 2022 Transcript, p. 50, attached at Add./229.

shows intent to dedicate to public use. Thus, even if the trial court's consideration of NEU's written statements divorced from its course of conduct were overlooked, along with its failure to consider inferences from the Town's conduct in reliance on NEU's statements and actions, the trial court nevertheless committed error in failing to assess whether NEU's half-century course of conduct was sufficient to create a triable issue of intent to dedicate.

Fourth, the trial court completely and fundamentally erred in ruling that acceptance of the dedication required proof of use by members of the public residing outside Nahant. To the contrary, use by any members of the general public, even those residing within Nahant near the Property, is sufficient, under case law in Massachusetts and other jurisdictions, to establish acceptance. The trial court erred in confusing the effect of dedication--ownership of any easement by the general public not just the Town of Nahant--with proof of acceptance which may be established by use by any members of the public. This clear error must be corrected by this Court.

Fifth, the trial court erred in ruling that Article 97's protections are not available because the Property was used for educational purposes as well as open space and parkland, and therefore had not been dedicated to the latter purposes. This ruling reflects a confusion of the fee interest which NEU retained in the land, and the dedicated easement which the public has accepted. The easement owned by the public is solely for purposes within Article 97 and therefore is within its protections. That the use of the fee interest retained by NEU may fall outside Article 97 does not mean that the use dedicated to the public is not protected by Article 97.

The trial court also failed to draw inferences in favor of Appellants as it was required to do on summary judgment and improperly concluded that NEU had met its burden of showing that Appellants had no reasonable expectation of proving intent to dedicate and that there was no triable issue of fact as to intent to dedicate.

STATEMENT OF RELEVANT FACTS

The Property. Nahant is essentially a one-square mile island extending into the Atlantic Ocean eight miles north of Boston, connected to the mainland by a

1.5 mile long causeway. It has virtually no commercial or industrial development. At its eastern tip is East Point, a 28-acre peninsula surrounded by ocean and steep cliffs on three sides. The views from East Point are stunning. See photographs at Add./155-60. A historic walking path provided access to these views until the military occupied East Point.

World War II brought the installation of various bunkers, gun emplacements, and submarine monitoring stations to East Point. Murphy Bunker, a 650-foot-long concrete structure which the military constructed and then buried, bisected the property north to south. To its west at the narrow entrance to East Point were small military barracks, which were adjacent to beaches on the north and south. To its east, on the area of what is now Lodge Park, in the 1950's the military constructed a below-ground Nike missile launching site. Then, East Point was declared surplus federal property and offered to the public pursuant to statute. As of the early 1960's, most of East Point was barren.

NEU's Acquisition of the Property. In April 1965, NEU submitted a proposal to acquire the whole of East Point in order to convert the military barracks into a

marine science center and make the entire property into a "wildlife preserve."² Nahant Town Meeting previously had declined to authorize purchase of the property by the Town, but the federal government made clear after NEU submitted its proposal that the Town may nevertheless still potentially acquire the Property for preservation purposes. The Town's Conservation Commission had been in favor of the Town acquiring the entire property, and at the very least an easement to restore the historic walking path and access to the ocean and cliffs. In response to the federal government's inquiries, the Conservation Commission threw its weight in favor of NEU's proposal, particularly if there were reserved to the public the right to walk along a pathway on the coastal edge of the upland and if some assurances were

²The trial court viewed the "wildlife preserve" that NEU intended to create as limited to the "littoral and benthonic faunas" of the coast line. Add./102. However, the 1965 Proposal does not describe any proposed development on the upland northeast portion above the coastline; NEU in fact preserved and did not develop the upland northeast portion from 1966 through 2018; and NEU stated publicly for nearly a decade that it was maintaining both "[t]he northeast portion of the property and the rocky coast . . . as a wildlife sanctuary." *Infra* at p.22, n.4 (emphasis added).

given that only low-lying or otherwise inconspicuous buildings were contemplated.

In early May 1965, NEU's President met with the Nahant Board of Selectmen and Conservation Commission and members of the public, and personally orally assured them, as requested by the Conservation Commission, that NEU would work with the Town to develop a walkway through the property which could be used by citizens and others to view the ocean and cliffs so that the public would continue to have the benefit of the beauty of the area. NEU's President confirmed these assurances in a May 17, 1965 letter: "[w]e further assured them [town residents and officials] we would work with the town in the development of a walkway through the property which could be used by the citizens and others to view the ocean and the cliffs . . . this way the town would still have the benefit of the beauty of the area". Add./126.

Based in part on the Conservation Commission's support, the federal government awarded 20 acres of East Point to NEU at no cost, while retaining 8 acres (containing the Nike missile silos) for use of the Navy. In recognition of the importance of the

Commission's support, NEU gave the Commission a commemorative plaque at the ceremonial opening of the MSC.³

NEU's Preservation of the Property. Consistent with its 1965 proposal, NEU maintained the Property as a wildlife preserve and did not develop the Property. It maintained the northeast portion--bounded by Murphy Bunker to the west, the Atlantic Ocean to the north, and the 8-acre parcel owned by the Town--as undeveloped open space for fifty-two years. During that period, flora and fauna flourished on the Property, which became covered by rejuvenated forest and meadow. The site became world-renowned for its population of migratory birds. It is a beautiful, vibrant preserve of wildlife and open space.

NEU was appropriately proud of its preservation efforts and announced them to the public for most of a

³ The trial court improperly discounted as "ambiguous" the written and oral assurances by NEU's President regarding public access to and enjoyment of the Property, without considering their context or the ensuing public use of the Property for a half-century. The court should have drawn the reasonable inferences in Appellants' favor that these assurances (i) were sufficiently specific that without them NEU would not have obtained the Town's support and acquired the Property; and (ii) led to the ensuing half-century of public use of the Property. Add./103.

decade, if not longer. The MSC website from at least 1999 through 2007 stated that "the northeast portion of the property and the rocky coast are maintained as a wildlife sanctuary and ecological study area" (emphasis added).⁴ Later, the MSC website included the text of a public audiotour of East Point, which stated that "[t]he thick vegetation surrounding the meadow below Lodge Park supports numerous land birds and the occasional white-tailed deer or red fox, and rarely, eastern coyote."

Use of the Property by the Public. Over the course of the fifty-two years that NEU preserved the Property, members of the public regularly used it for multiple forms of passive recreation. They walked through it to view the ocean and cliffs. They fished from the cliffs. The Boy Scouts built a path to the top of Murphy Bunker and the public climbed up on it

⁴ The trial court stated that the lack of specificity of the boundaries of the "northeast portion" indicated lack of intent to dedicate. Add./105. Yet NEU used that very term on its website to describe the scope of the wildlife sanctuary it was maintaining. And the Town used that same language to describe the wildlife sanctuary NEU was maintaining. Add./121. NEU has never disputed the boundaries of the "northeast portion." To the extent there is any uncertainty as to the boundaries, it may be resolved at trial. Attorney General v. Abbott, 154 Mass. 323, 327-328 (1891).

to view the ocean and cliffs and to use a rope swing there. Members of the public picnicked on the Property, gazed at the stars from it, had sunrise services, weddings and other celebrations there. They hiked all over existing paths on the Property, including adjacent to its cliffs. Residents not only from Nahant but also throughout eastern Massachusetts came to the Property and to Lodge Park to view migratory and other birds. The public considered the Property to be a public park. Add./141.

Development of Lodge Park and Town Planning

Efforts. In reliance on NEU's commitment to maintain the Property as a wildlife preserve and open space, in 1989 the Town's Conservation Commission issued a Request for Proposals ("1989 RFP") to develop Lodge Park on the eight-acre parcel next to the Property. The 1989 RFP indicates that developing a park in that location made sense given that "[t]he northeast portion of the property and the rocky coast are maintained [by NEU] as a wildlife sanctuary" (emphasis added). One of the primary purposes of developing Lodge Park was to take advantage of the magnificent views of the ocean and cliffs, including across the forest and meadow preserved by NEU as open

space on the Property below it. "The elevated Nike site provides excellent viewing areas of the wildlife sanctuary maintained by Northeastern" Add./121 (emphasis added).

The Town consistently characterized the Property as open space with public use or access in its Open Space Reports in 1989, 2000, and 2008. In 1990-1991, the Town rezoned all of East Point including the Property as a Natural Resource District allowing continued use for passive recreation but prohibiting any development not for conservation or recreational purposes.

NEU's Proposal for a 55,000 s.f. Building. After fifty-two years of preserving the Property as a wildlife preserve and open space, and not objecting at any time to the public's use of the Property for passive recreation throughout that period, NEU announced in early 2018 that it intended to raze the forest and meadow on the Property and build a 55,000 s.f. glass and steel structure. This drastic change of use, motivated by visions of empire-building by NEU, would destroy the very wildlife and open space NEU had promised to preserve and had preserved for more than a half-century, and would be starkly

inconsistent with the Town's planning efforts for the past three decades.

ISSUES OF LAW RAISED BY THIS APPEAL

Appellants seek Direct Appellate Review on the following issues that were properly raised and preserved in the trial court:

(1) Whether the trial court erred in concluding that NEU's allowance of unrestricted public use of the Property for passive recreation and its maintenance of the property as a wildlife preserve for more than a half-century, along with other dedicatory statements by NEU, are insufficient to warrant a trial on intent to dedicate for public use, even though this Court's precedent is that allowance of such public use is "very strong evidence" of intent to dedicate and even though this Court left open in Smith whether such a long period of public use might be enough by itself to show dedication as parkland under Article 97.

(2) Whether the trial court erred in concluding that acceptance of the Property for public dedication requires use by members of the public who do not live in Nahant, even though there is absolutely no Massachusetts precedent for such requirement and even though the summary judgment record showed public use

for more than a half-century by people who lived outside of Nahant as well as those from Nahant.

(3) Whether the trial court erred in failing to consider the Town of Nahant's development of abutting property at the tip of East Point as a park and the Town's open space planning efforts, taken in reliance on NEU's preservation of its Property as a wildlife sanctuary and open space, as evidence of both NEU's dedicatory intent and acceptance of the dedication by the public.

(4) Whether the trial court erred in concluding that the Property cannot be dedicated to public use as parklands and the public cannot thereby obtain an easement protected under Article 97, simply because NEU retained use of the fee interest in the Property for ecological study that is consistent with public use of the property as parklands.

ARGUMENT

- I. THE TRIAL COURT ERRED IN CONCLUDING THAT NEU'S ALLOWANCE OF UNRESTRICTED PUBLIC USE OF THE PROPERTY FOR PASSIVE RECREATION AND ITS MAINTENANCE OF THE PROPERTY AS A WILDLIFE PRESERVE FOR MORE THAN A HALF-CENTURY, ALONG WITH OTHER DEDICATORY STATEMENTS BY NEU, ARE INSUFFICIENT TO WARRANT A TRIAL ON NEU'S INTENT TO DEDICATE FOR PUBLIC USE.

The trial court erred in concluding that Appellants had not provided sufficient evidence for a reasonable jury to find that NEU intended to dedicate the Property to public use. Importantly, the trial court utterly disregarded NEU's half-century of preservation of the Property as a wildlife preserve and the public's unrestricted use of the Property for that entire period, which is strong evidence of intent to dedicate under this Court's precedent. The trial court also wrongly disregarded NEU's repeated public statements, including when it acquired the Property with the Town's support, that it would maintain and was maintaining the property as a wildlife preserve or sanctuary. Together, these facts, viewed with inferences drawn in Appellants' favor, create triable issues of intent to dedicate under the "totality of circumstances" test described in Smith. Indeed, the public use of the Property for fifty-two years, by

itself, is sufficient under Smith to require a trial as to dedicatory intent.

A. The Trial Court Failed to Consider NEU's Half-Century Preservation of the Property As a Wildlife Preserve and Open Space and the Public's Half-Century of Use for Passive Recreation as Evidence of NEU's Dedicatory Intent.

Open space and scenic views are well-established subjects of dedication for public use. Onset Bay, 221 Mass. at 347-48. See Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 526 (1887) (Holmes, J.) (evidence of dedication as public park should have been submitted to jury); Attorney General v. Abbott, 154 Mass. at 325-27 (owners of Oak Bluffs property intended to dedicate parcels "[as] spaces or parks [that] should always be kept open"); Attorney General v. Vineyard Grove Co., 181 Mass. 507, 509 (1902) (Holmes, C.J.) (dedication to keep view of sea unobstructed was valid purpose).

It is also well-established that intention to dedicate land for parks and open space "'may be manifested by the owner's acts from which such an intention can be inferred.'" Smith, 478 Mass. at 59, quoting Onset Bay, 221 Mass. at 348.

Despite this ample precedent, the trial court failed to consider NEU's actual preservation of the property as a wildlife preserve and open space for a half-century as relevant evidence of NEU's intent to dedicate. Astonishingly, the Decision does not mention this half-century course of conduct, either in its fact section or in its analysis of the evidence of NEU's intent to dedicate.

The trial court also erred in its treatment of the actual fifty-two years of uninterrupted public use of the Property for passive recreation. "Evidence of user is competent, and often important, as bearing on the question of dedication, when that is in dispute; for if a man stands by, seeing the public use a way, permits it, and says nothing, it is very strong evidence to show an intention to dedicate." Hayden, 112 Mass. at 350. See Smith, 478 Mass. at 64 (use of land as public park for more than sixty years was relevant factor indicating intent to dedicate). Yet the trial court gave mere lip service to this history of actual public use by mentioning it cursorily at the end of its statement of facts, (Add./94), and not at all in its analysis of intent to dedicate.

B. The Trial Court Failed to Consider the Town of Nahant's Actions in Reliance on NEU's Statements and Conduct as Evidence of NEU's Dedicatory Intent.

The Town developed Lodge Park, connecting to the Property in reliance on NEU's preservation of it as a wildlife preserve and open space. The Town Conservation Commission's 1989 RFP stated that "[t]he northeast portion of the property and the rocky coast are maintained as a wildlife sanctuary" by NEU. The RFP emphasized that Lodge Park would preserve and enhance the open space and passive recreation at East Point, in part because its elevated site "provides excellent viewing areas of the wildlife sanctuary maintained by Northeastern" These statements and actions by a purchaser of abutting property, in reliance on an owner's representations and conduct, are relevant to intent to dedicate. Onset Bay, 221 Mass at 348-49. Yet the Decision nowhere mentions the 1989 RFP.

Nor does the Decision mention the undisputed evidence that the Town's Open Space Reports in 1989, 2000, and 2008 consistently characterized the NEU Property as open space with public use or access. Nor does the Decision mention that the Town rezoned the

Property as a Natural Resource District in 1990-1991 allowing only passive recreational uses, again in reliance on NEU's actual preservation of the Property as open space and the public use of the Property for passive recreation.

The trial court should have drawn in Appellants' favor the inference that these statements and actions by the Town were based on NEU's statements and actions reflecting an intent to dedicate. Hayden, 112 Mass. at 350. The court acknowledged this at the hearing on the summary judgment motion, *supra* at 15, n.1, but omitted any mention of this evidence in the Decision.

C. The Trial Court Failed to Consider NEU's Own Statements That It Was Maintaining the Property as a Wildlife Sanctuary as Evidence of NEU's Dedicatory Intent.

Under Smith and case law dating back one-and-a-half centuries, a dedicator's own statements are key evidence of intent to dedicate. 478 Mass. at 59, 63; Onset Bay, 221 Mass. at 348-49. Here, NEU's own website stated, over the course of at least eight years from 1999 to 2007, that "[t]he northeast portion of the property and the rocky coast are maintained [by NEU] as a wildlife sanctuary..." (emphasis added). This is the exact same language that was used by the

Town in its 1989 RFP. This language reflects an intent to dedicate the property as open space, or at least permits a reasonable inference to that effect. Yet the trial court gave mere lip service to it, mentioning it in only one sentence in the penultimate paragraph of the fact section of the Decision, (Add./94), and not at all in the analysis of intent to dedicate.

D. The Trial Court Failed to Draw Inferences In Appellants' Favor in Interpreting Other Dedicatory Statements by NEU

The trial court repeatedly interpreted statements by NEU as not reflecting an intent to dedicate, when reasonable inferences could and should have been drawn to reach the opposite conclusion. For example, NEU stated in its 1965 proposal that it "seeks to acquire the whole of East Point in order to make it a wildlife preserve." The trial court discounted this statement as not implying public access. But the statement does indicate an intent to make a wildlife preserve and maintain the land in an undeveloped state, access to which NEU provided the public for a half-century. The court also interpreted this statement as limited to protecting the "unusual littoral and benthonic faunas" in the shoreline area, but NEU's actions and

statements for a half-century reflect its intention to maintain the entire northeast portion of the site as open space and a wildlife preserve. The trial court also said that the remainder of the 1965 proposal contemplated building construction activities, but a close review of the proposal clearly shows that none of those activities were to take place on the northeast portion of the site.

The trial court erred in failing to draw reasonable inferences in Appellants' favor as to this and other statements by NEU, as is required on summary judgment. Regis College v. Town of Weston, 462 Mass. 280, 292-94 (2012).

E. The Fifty-Two Years of Preservation and Public Use Is Sufficient By Itself to Show a Reasonable Expectation of Proving Intent to Dedicate at Trial

The totality of statements and conduct by NEU, the public, and the Town, taken in context, are more than sufficient to show that NEU has not met its burden of showing that Appellants lack a reasonable expectation of proving dedicatory intent at trial. Yet even if the trial court were correct in discounting all other evidence submitted by Appellants, the half-century of preservation by NEU as

a wildlife sanctuary and open space and use by the public for passive recreation is enough evidence by itself to defeat summary judgment. See Hayden, 112 Mass. at 349 ("No specific length of time is necessary; the acts of the parties to the dedication when once established complete it."). Other jurisdictions have ruled that continuous public use for periods less than fifty years are sufficient to establish dedication. This issue was not reached by this Court in Smith, 478 Mass. at 64, but if it is reached here, it must be determined in Appellants' favor.

In sum, summary judgment should not have entered in NEU's favor. Kalorama Citizens Ass'n v. SunTrust Bank Co., 286 A.3d 525, 537 (D.C. 2022) (genuine dispute of material fact exists as to Bank's intent to dedicate public easement to Plaza).

II. THE TRIAL COURT ERRED IN RULING THAT ACCEPTANCE OF THE DEDICATION REQUIRES PROOF OF USE BY MEMBERS OF THE PUBLIC RESIDING OUTSIDE NAHANT

The trial court committed clear error in interpreting the acceptance element of the public dedication doctrine under Smith. It ruled, without the benefit of briefing by the parties on the issue, that use by Nahant residents was not sufficient to

establish use by the "general public". Add./108-10.

The trial court improperly mixed up the effect of dedication and acceptance--which is ownership by the Commonwealth of Massachusetts of a public easement in the property--with what is required to be shown to establish the element of acceptance. The cases cited by the trial court stand only for the effect of dedication and acceptance, not for the proposition that use by non-Nahant residents is required to prove acceptance by the general public. To the contrary, Massachusetts cases indicate that public use may constitute acceptance where the users are located near the property being used; their use results in acceptance and dedication of the property for the benefit of all residents of the Commonwealth. See Onset Bay, 143 Mass. at 347 (parks and groves were accepted as open space by purchasers of abutting lots and village residents); Attorney General v. Tarr, 148 Mass. 309, 313-14, 318 (1889) (town's public declaration that landing places were set apart "for the public use for the inhabitants of Gloucester" was properly understood as indicating that, as town residents are a portion of the general public, the use was primarily intended for their benefit, but the

public in general also acquires rights thereby; use by fishermen as a portion of the public effects acceptance on behalf of all members of the public having lawful right to use landing places). The trial court's ruling is also inconsistent with cases from other states and federal circuit courts on this issue.

In any event, the trial court's ruling is at odds with the undisputed summary judgment record, which shows use of the Property by non-Nahant residents. The Court also erred in not addressing the Town's development of Lodge Park in reliance on NEU's dedication as sufficient acceptance on behalf of the public.

III. THE TRIAL COURT ERRED IN RULING THAT THE PROPERTY WAS NOT PROTECTED BY ARTICLE 97 BECAUSE IT WAS ALSO USED FOR EDUCATIONAL PURPOSES

Without the benefit of briefing by the parties, the trial court *sua sponte* misapplied Mahajan v. Dep't of Env't Prot., 464 Mass. 604 (2013), and held that Article 97 did not apply to the Property because NEU has used it for ecological study, an educational purpose. This was error because the Property was dedicated to public use only for purposes that fall squarely within Article 97, that is, wildlife preservation, open space for parkland and passive

recreation. The public's easement was only for these Article 97 purposes, and therefore the easement is protected under Article 97. While NEU may continue to use its own underlying fee interest in the Property for ecological study that is consistent with public use of the Property as parkland, that does not prevent the public's easement from being protected by Article 97.

REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

These grave misapplications of this Court's precedent should be reviewed on direct appellate review. If the trial court's Decision is allowed to stand, land protection under the dedication to public use doctrine and Article 97 will be improperly and radically limited. The trial court's errors involve issues of land protection that are intensely important to municipalities and land trust organizations throughout the Commonwealth. They involve an area of common and constitutional law which spans centuries and which was addressed in Smith but which requires clarification for the benefit of lower courts as well as affected parties.

Other cases involving dedication of parklands to public use are being actively litigated, including

cases involving acceptance of shorelands by use by members of the public. See Stempler v. Attorney General of the Commonwealth, Mass. Land Ct. No. 95 MISC 222901, Dkt. entries dated 2/13/23 and 3/8/23 (Add./161-79) (reopening discovery in 28 year old case regarding public acceptance of dedication of rocks by ocean in Rockport through public use).

In addition, this Court recently took up an appeal *sua sponte* and solicited amicus briefs on the question whether the standard articulated in Smith, which requires a consideration of the actual use and a totality of circumstances to determine the dedicator's intent, applies likewise to specific-purpose designations of land under c. 40, § 15A. See Carroll v. Town of Norwell, SJ-13410. The questions presented on this appeal, including whether the 50-year use and course of conduct must be considered as part of the totality of circumstances under Smith similarly counsel this Court's taking this case directly.

This case involves a uniquely historic and scenic property and significant wildlife habitat to which public access may be deprived, and preservation of which may cease, for the first time in a half-

century, to the detriment of the general public as well as the residents of Nahant. Without this Court's involvement, land protections under the public use doctrine and Article 97 risk major curtailment. This Court's review is warranted in order to clarify the application of these common law and constitutional doctrines on which municipalities and land trust organizations throughout the Commonwealth rely in their continuing land protection efforts. The trial court's decision thus raises "novel questions of law," which are "of such public interest that justice requires a final determination by the full Supreme Judicial Court." Mass. R. App. P. 11(a)(1), (3).

CONCLUSION

Because the case presents fundamental issues about the common law dedication to public use doctrine, Article 97 of the Amendments to the Massachusetts Constitution and implicates recurring questions of significant public interest, the application for direct appellate review should be granted.

CERTIFICATE OF SERVICE

I, Harley C. Racer, counsel to the Appellants, hereby certify that on this 3rd day of May, 2023, I caused a true and accurate copy of the Appellants' Application for Direct Appellate Review to be served by efile and email upon counsel for each Appellee.

/s/Harley C. Racer

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CERTIFICATE OF COMPLIANCE WITH MASS. R. A. P. 16(k)

Harley C. Racer, counsel of record for the Appellants, Hopedale Citizens hereby certifies, pursuant to Mass. R. A. P. 16(k), that the Application for Direct Appellate Review complies with all applicable rules of court concerning the filing of briefs, including Mass. R. A. P. 16(a)(1), (3), (4), (9), (11)-(15). The argument of the brief is 10 pages, using Courier New monospaced 12-point font, typed on Word.

/s/Harley C. Racer

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ADDENDUM

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1977CV01211 Nahant Preservation Trust, Inc. et al vs. Northeastern University

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- Declaratory Judgment G.L. c. 231A
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- Karp, Hon. Jeffrey
- Next Event:
-

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Solomon, Susan
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Spirn, Paul
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Steinberg, Donna
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- Defendant

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Town of Nahant
- Plaintiff-Intervenor

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Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
11/19/2019 02:00 PM	Civil A	SALEM-5th FL, CR H (SC)	Conference to Review Status	Deakin, Hon. David A	Held as Scheduled
12/18/2019 09:00 AM	Civil B	NWBPORT-2nd FL, CR 1 (SC)	Hearing on Equity Issue	Tabit, Hon. Salim	Held - Under advisement
01/30/2020 02:00 PM	Civil B	NWBPORT-2nd FL, CR 1 (SC)	Rule 16 Conference		Rescheduled
02/06/2020 02:00 PM	Civil B	NWBPORT-2nd FL, CR 1 (SC)	Rule 16 Conference	McCarthy-Neyman, Hon. Kathleen	Held as Scheduled
03/31/2020 02:00 PM	Civil B	NWBPORT-2nd FL, CR 1 (SC)	Rule 12 Hearing	McCarthy-Neyman, Hon. Kathleen	Canceled
11/10/2020 11:00 AM	Civil A	SALEM-5th FL, CR H (SC)	Rule 56 Hearing	Howe, Hon. Janice W	Not Held
12/01/2020 11:00 AM	Civil A	SALEM-5th FL, CR H (SC)	Rule 56 Hearing	Howe, Hon. Janice W	Not Held
01/26/2021 10:00 AM	Civil A	SALEM-5th FL, CR H (SC)	Rule 56 Hearing	Karp, Hon. Jeffrey	Rescheduled
01/26/2021 02:00 PM	Civil A	SALEM-5th FL, CR H (SC)	Rule 56 Hearing	Karp, Hon. Jeffrey	Held as Scheduled
07/16/2021 10:00 AM	Criminal (Lawrence)	LAWRENCE-3rd FL, CR 4 (SC)	Motion Hearing	Karp, Hon. Jeffrey	Held as Scheduled
08/26/2021 02:00 PM	Criminal (Lawrence)	LAWRENCE-3rd FL, CR 4 (SC)	Rule 56 Hearing	Karp, Hon. Jeffrey	Not Held
09/14/2021 02:00 PM	Civil A	SALEM-5th FL, CR H (SC)	Conference to Review Status	Karp, Hon. Jeffrey	Not Held
12/01/2021 02:30 PM	Civil A	SALEM-5th FL, CR H (SC)	Conference to Review Status	Karp, Hon. Jeffrey	Held via Video/Teleconference
05/20/2022 09:00 AM	Civil A	SALEM-5th FL, CR H (SC)	Rule 56 Hearing	Karp, Hon. Jeffrey	Held - Under advisement
05/20/2022 09:30 AM	Criminal 3 - I	SALEM-5th FL, CR I (SC)	Rule 56 Hearing	Karp, Hon. Jeffrey	Held - Under advisement
08/24/2022 02:00 PM	Criminal 1 - K	SALEM-5th FL, CR K (SC)	Final Pre-Trial Conference	Karp, Hon. Jeffrey	Not Held
08/24/2022 02:00 PM	Civil A	SALEM-5th FL, CR H (SC)	Final Pre-Trial Conference	Karp, Hon. Jeffrey	Not Held
09/21/2022 02:00 PM	Civil B	NWBPORT-2nd FL, CR 1 (SC)	Final Pre-Trial Conference	Karp, Hon. Jeffrey	Not Held
10/14/2022 10:00 AM	Civil D	LAWRENCE-2nd FL, CR 3 (SC)	Final Trial Conference	Karp, Hon. Jeffrey	Not Held
10/31/2022 09:00 AM	Civil D	LAWRENCE-2nd FL, CR 3 (SC)	Jury Trial	Karp, Hon. Jeffrey	Not Held
10/31/2022 02:00 PM	Civil D	LAWRENCE-1st FL, CR 1 (SC)	Trial Assignment Conference	Karp, Hon. Jeffrey	Held via Video/Teleconference
01/18/2023 02:00 PM	Civil A	SALEM-5th FL, CR H (SC)	Rule 56 Hearing	Karp, Hon. Jeffrey	Not Held
01/18/2023 02:00 PM	Civil B	NWBPORT-2nd FL, CR 1 (SC)	Rule 56 Hearing	Karp, Hon. Jeffrey	Held - Under advisement

Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Service	08/20/2019	11/18/2019	90	08/28/2019
Answer	08/20/2019	12/18/2019	120	01/23/2023
Rule 12/19/20 Served By	08/20/2019	12/18/2019	120	01/23/2023
Rule 12/19/20 Filed By	08/20/2019	01/17/2020	150	01/23/2023
Rule 12/19/20 Heard By	08/20/2019	02/18/2020	182	01/23/2023
Rule 15 Served By	08/20/2019	10/13/2020	420	01/23/2023
Rule 15 Filed By	08/20/2019	11/12/2020	450	01/23/2023
Rule 15 Heard By	08/20/2019	11/12/2020	450	01/23/2023
Discovery	08/20/2019	11/09/2021	812	05/20/2022
Rule 56 Served By	08/20/2019	12/16/2021	849	05/20/2022
Rule 56 Filed By	08/20/2019	02/18/2022	913	05/20/2022
Final Pre-Trial Conference	08/20/2019	06/07/2022	1022	01/23/2023
Judgment	08/20/2019	08/19/2022	1095	01/23/2023
Status Review	10/31/2019	09/14/2021	684	01/23/2023
Under Advisement	12/18/2019	01/17/2020	30	01/08/2020
Status Review	02/09/2021	09/14/2021	217	01/23/2023
Under Advisement	05/20/2022	06/19/2022	30	01/23/2023
Under Advisement	05/20/2022	06/19/2022	30	01/23/2023
Under Advisement	01/18/2023	02/17/2023	30	01/23/2023
Status Review	02/13/2023	02/24/2023	11	03/03/2023

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Nahant Preservation Trust, Inc.		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Nahant Preservation Trust, Inc.		
08/20/2019	Case assigned to: DCM Track A - Average was added on 08/20/2019		Image
08/20/2019	Original civil complaint filed. EXHIBITS ON FILE	1	Image
08/20/2019	Civil action cover sheet filed.	2	
08/20/2019	Demand for jury trial entered.		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Christian Bauta		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Christian Bauta		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Christian Bauta		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Tess Bauta		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Tess Bauta		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Tess Bauta		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Elizabeth K Berman		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Elizabeth K Berman		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Elizabeth K Berman		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Anne Bromer		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Anne Bromer		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Anne Bromer		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Candace Cahill		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Candace Cahill		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Candace Cahill		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Michelle Capano		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Michelle Capano		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Michelle Capano		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Alice Cort		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Alice Cort		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Alice Cort		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Mark Cullinan		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Mark Cullinan		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Mark Cullinan		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Carl Jenkins		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Carl Jenkins		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Carl Jenkins		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Marilyn Mahoney		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Marilyn Mahoney		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Marilyn Mahoney		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff William Mahoney		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff William Mahoney		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff William Mahoney		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Dan McMackin		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Dan McMackin		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Dan McMackin		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Diane Monteith		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Diane Monteith		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Diane Monteith		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Andrea Murphy		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Andrea Murphy		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Andrea Murphy		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Jeffrey Musman		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Jeffrey Musman		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Jeffrey Musman		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Marie Elizabeth Pasinski, M.D.		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Marie Elizabeth Pasinski, M.D.		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Marie Elizabeth Pasinski, M.D.		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Roger Pasinski, M.D.		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Roger Pasinski, M.D.		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Roger Pasinski, M.D.		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Vi Patek		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Vi Patek		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Vi Patek		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Linda Pivacek		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Linda Pivacek		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Linda Pivacek		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Emily Potts		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Emily Potts		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Emily Potts		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Laura Poulin		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Laura Poulin		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Laura Poulin		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Peter Rogal		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Peter Rogal		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Peter Rogal		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Peggy Silva		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Peggy Silva		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Peggy Silva		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Susan Solomon		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Susan Solomon		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Susan Solomon		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Paul Spirn		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Paul Spirn		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Paul Spirn		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Donna Steinberg		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Donna Steinberg		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Donna Steinberg		
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Jim Walsh		
08/20/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Jim Walsh		
08/20/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Jim Walsh		
08/20/2019	Nahant Preservation Trust, Inc.'s MOTION for appointment of Special Process Server.	3	Image
08/20/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Nahant Preservation Trust, Inc.		
08/21/2019	Attorney appearance On this date David E Lurie, Esq. added for Plaintiff Patrick O'Reily		
08/21/2019	Attorney appearance On this date Karen E Friedman, Esq. added for Plaintiff Patrick O'Reily		
08/21/2019	Attorney appearance On this date Harley Clarke Racer, Esq. added for Plaintiff Patrick O'Reily		
08/21/2019	Endorsement on Motion for Appointment Of Special Process Server (#3.0): ALLOWED		Image
09/04/2019	General correspondence regarding Notice of Request for Transfer Land Court Case to Essex Superior Court (filed with CJ Carey, copy to Judge Feeley, RAJ)	4	Image
09/05/2019	Service Returned for 8/26/19 Defendant Northeastern University: Service accepted by counsel; filed 8/28/19	5	Image
09/06/2019	General correspondence regarding Opposition to Request to Transfer Land Court case to Essex Superior Court (filed with CJ Carey, copy to Judge Feeley, RAJ)	6	Image
09/13/2019	Defendant Northeastern University's Reply to a letter dated September 9, 2019 from Harley C. Racer, Esq., counsel to Nahant Preservation Trust, Inc.	7	Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	and individual parties (collectively, The "NPT Parties").		
09/13/2019	Attorney appearance On this date Kevin Patrick O'Flaherty, Esq. added for Defendant Northeastern University		
09/25/2019	Defendant Northeastern University's Motion to dismiss Pursuant To Mass.R.Civ.P.8 Or In The Alternative Motion To Strike Pursuant To Mass.R.Civ.P 12(f) And Motion To Dismiss Counts IV And V For Lack Of Standing, Or, Alternatively To Strike Counts IV And V (filed 9/23/19) DOCKETED ONLY AS 9E NOTICE OF INTENT TO FILE MOTION (original motion mistakenly filed by counsel; 9A package will be filed upon completion of 9A process)	8	Image
09/25/2019	Northeastern University's Memorandum in support of Its Motion To Dismiss Pursuant To Mass.R.Civ.P.8 Or In The Alternative Motion To Strike Pursuant To Mass.R.Civ.P 12(f) And Motion To Dismiss Counts IV And V For Lack Of Standing, Or, Alternatively To Strike Counts IV And V (filed 9/23/19) DOCKETED ONLY AS 9E NOTICE OF INTENT TO FILE MEMORANDUM (original memorandum mistakenly filed by counsel; 9A package will be filed upon completion of 9A process)	8.1	Image
09/25/2019	General correspondence regarding Transfer Request (9/25/19)	9	Image
10/30/2019	Nahant Preservation Trust, Inc.'s request for Default 55(a) Applies To: Northeastern University (Defendant)	10	
10/30/2019	Affidavit of Racer in Support of Request for Default Applies To: Northeastern University (Defendant)	10.1	
10/31/2019	Opposition to Plaintiffs' Request For Default filed by Northeastern University	11	Image
10/31/2019	Affidavit of Kevin P. O'Flaherty	11.1	Image
11/04/2019	Opposition to Defendant's Motion To Dismiss filed by Nahant Preservation Trust, Inc.and twenty-eight citizens ("NPT Parties" or "Plaintiffs") filed 11/1/19	12	Image
11/04/2019	Request for hearing filed filed 11/1/19 Applies To: Nahant Preservation Trust, Inc. (Plaintiff)	12.1	Image
11/04/2019	Rule 9A notice of filing filed 11/1/19	12.2	Image
11/18/2019	Plaintiffs(s) Nahant Preservation Trust, Inc.'s Motion for a Temporary Restraining Order, for a Preliminary Injunction	13	Image
11/18/2019	Nahant Preservation Trust, Inc.'s Memorandum in support of Motion for Preliminary Relief	13.1	Image
11/18/2019	Plaintiffs(s) Nahant Preservation Trust, Inc.'s MOTION for Short Order of Notice Applies To: Northeastern University (Defendant)	14	Image
11/18/2019	Affidavit of Harley C. Racer in support of plaintiffs' motion for temporary restraining order and motion for preliminary injunction.	14.1	Image
11/18/2019	ORDER: ON PLAINTIFFS' REQUEST FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY RELIEF The parties stipulate that Defendant NEU shall refrain from further cutting, tree removal, digging, boring, drilling, dredging, altering, excavating or destroying in any way the land on top of and to the east of Murphy Bunker at East Point, Nahant, including without limitation the proposed work described in Tim Mackay's November 14, 2019 email and attached site plan, until issuance of an order on Plaintiffs' motion for preliminary injunction, after a hearing during the week of December 16, 2019.	15	Image
11/19/2019	Event Result:: Conference to Review Status scheduled on: 11/19/2019 02:00 PM Has been: Held as Scheduled Comments: Case to be sent to B session for hearing on Motion for TRO on 12/18/19 at 9:00am. Opposition to be filed no later than 3:30pm on Friday, 12/13/19 via email to Newburyport clerk. Original opposition to be filed on 12/18/19. Case to remain in Newburyport until Monday, April 6 at which time it will return to the A session. Hon. David A Deakin, Presiding Staff: Carlotta Patten, Assistant Clerk Magistrate		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/19/2019	The following form was generated: Notice to Appear Sent On: 11/19/2019 14:28:13		
11/19/2019	Docket Note: Case sent to NBPT until 4/6/20		
12/03/2019	ORDER: OF TRANSFER, Pursuant to the authority contained in G.L.c.211B,s9 and my inherent authority as the Chief Justice of the Trial Court, the above-entitled action (see 1977cv1503) is transferred to the Superior Court Department sitting in Essex County and is consolidated for hearing purposes only with Nahant Preservation Trust, Inc., et al. v. Northeastern University, Essex County, Superior Court Department, No. 1977CV01211	16	
12/10/2019	Affidavit of Harley C. Racer(second) in Support of Plaintiff's motion for Preliminary Injunction filed 12/10/19	17	Image
12/10/2019	Affidavit of Linda Pivacek in support of Plaintiff's Motion for Temporary Restraining Order And Motion For Preliminary Injunction filed 12/10/19	18	Image
12/17/2019	Opposition to motion for injunctive relief filed by Northeastern University	19	
12/17/2019	Affidavit of Geoffrey Trussell,Ph.D filed 12/16/19	20	
12/17/2019	Affidavit of Timothy J. Mackay,AIA filed 12/16/19	21	
12/17/2019	Affidavit of Brian T. Madden	22	
12/17/2019	Affidavit of Kaileigh A. Callender, Esq filed 12/16/19	23	
12/17/2019	Nahant Preservation Trust, Inc., Christian Bauta, Tess Bauta, Elizabeth K Berman, Anne Bromer, Candace Cahill, Michelle Capano, Alice Cort, Mark Cullinan, Carl Jenkins, Marilyn Mahoney, William Mahoney, Dan McMackin, Diane Monteith, Andrea Murphy, Jeffrey Musman, Patrick O'Reilly, Marie Elizabeth Pasinski, M.D., Roger Pasinski, M.D., Vi Patek, Linda Pivacek, Emily Potts, Laura Poulin, Peter Rogal, Peggy Silva, Susan Solomon, Paul Spirn, Donna Steinberg, Jim Walsh's Reply Memorandum in support of motion for preliminary relief (Filed 12/17/19)	24	
12/18/2019	Matter taken under advisement: Hearing on Equity Issue scheduled on: 12/18/2019 09:00 AM Has been: Held - Under advisement Comments: FTR - 8:57:26 Hon. Salim Tabit, Presiding Staff: Jo Dee Doyle, Assistant Clerk Magistrate		
12/18/2019	The following form was generated: Notice to Appear Sent On: 12/18/2019 10:17:58		
12/23/2019	Affidavit filed by Timothy MacKay, AIA for filed 12/23/19	25	Image
12/27/2019	General correspondence regarding Letter from Attorney David Lurie to Judge Tabit	26	Image
01/02/2020	Defendant Northeastern University's Submission of a letter from atty O' Flaherty filed 1/2/2020	27	Image
01/02/2020	Plaintiff Nahant Preservation Trust, Inc.'s Submission of additional information regarding issues raised by court filed 1/2/2020	28	Image
01/08/2020	Plaintiff Nahant Preservation Trust, Inc.'s Submission to Judge Tabit dated 1/6/20	30	
01/08/2020	MEMORANDUM & ORDER: Because the court concludes that the Nahant Plaintiffs have failed to demonstrate they are likely to succeed on the merits of their claims, it is hereby ORDERED that the Motion for Preliminary Injunction be DENIED. The court stays this order until January 24, 2020. Judge: Tabit, Hon. Salim	31	Image
01/08/2020	Docket Note: Papers 27-31 sent to Newburyport Superior Court		
01/09/2020	Plaintiff Nahant Preservation Trust, Inc.'s Submission of additional information regarding issues raised. filed 1/2/2020	29	Image
01/28/2020	Plaintiffs Nahant Preservation Trust, Inc.'s Petition for for interlocutory Relief filed 1/22/20	32	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Applies To: Nahant Preservation Trust, Inc. (Plaintiff)		
01/28/2020	Nahant Preservation Trust, Inc.'s Memorandum in support of of petition for interlocutory relief. filed 1/22/20 Applies To: Nahant Preservation Trust, Inc. (Plaintiff)	32.1	
01/28/2020	Plaintiff Nahant Preservation Trust, Inc.'s Submission of Record appendix volume 1of 2 and 2 of 2. filed 1/22/20. Applies To: Nahant Preservation Trust, Inc. (Plaintiff)	32.2	
01/28/2020	Plaintiff Nahant Preservation Trust, Inc.'s EMERGENCY Motion to continue stay of decision pending resolution of the single justice petition. filed 1/22/20. Applies To: Nahant Preservation Trust, Inc. (Plaintiff)	33	
01/28/2020	Notice of appeal filed. filed 1/27/20. Applies To: Nahant Preservation Trust, Inc. (Plaintiff)	34	Image
01/28/2020	Brief filed: Reply Plaintiffs' reply in support of their emergency motion to continue stay of decision. filed 1/27/20. Applies To: Nahant Preservation Trust, Inc. (Plaintiff)	35	Image
01/28/2020	Plaintiff Nahant Preservation Trust, Inc.'s Joint Motion to Continue rule 16 conference to February 6,2020.	36	Image
01/29/2020	Endorsement on Motion to continue rule 16 conference to February 6, 2020 (#36.0): ALLOWED Upon review and written agreement of the parties, motion is ALLOWED. (McCarthy, J)		Image
01/29/2020	Event Result:: Rule 16 Conference scheduled on: 01/30/2020 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Kathleen McCarthy-Neyman, Presiding Staff: Jo Dee Doyle, Assistant Clerk Magistrate		
02/03/2020	Plaintiff Mark Cullinan's notice of voluntary dismissal without prejudice of all claims against Defendant Northeastern University. filed 2/3/20(email)	37	
02/06/2020	Event Result:: Rule 16 Conference scheduled on: 02/06/2020 02:00 PM Has been: Held as Scheduled Comments: Rule 16 held in both consolidated cases Hon. Kathleen McCarthy-Neyman, Presiding		
02/07/2020	Brief filed: Joint Statement for Rule 16 Conference February 6, 2020 - filed 2/6/20 Applies To: Nahant Preservation Trust, Inc. (Plaintiff); Northeastern University (Defendant)	38	Image
02/07/2020	ORDER: Pretrial Order (McCarthy, J.) Applies to Trial in 1977CV01503 only Applies To: Nahant Preservation Trust, Inc. (Plaintiff); Northeastern University (Defendant)	39	Image
02/07/2020	Notice of docket entry received from Appeals Court ORDER 4 all relief requested by the petition is DENIED. The 1/24/20 stay of the order of the Superior Court dated 1/8/20 and at issue in the plaintiffs' petition is hereby VACATED. filed 1-31-20 Applies To: Nahant Preservation Trust, Inc. (Plaintiff); Northeastern University (Defendant)	40	Image
02/07/2020	Notice of docket entry received from Appeals Court The hearing in this matter is rescheduled for Tuesday January 28, 2020 at 2:30pm filed 1-29-20 Judge: McCarthy-Neyman, Hon. Kathleen Applies To: Nahant Preservation Trust, Inc. (Plaintiff); Northeastern University (Defendant)	41	Image
02/07/2020	Docket Note: Trial of three jury issues framed by Foster, J. in 1977CV01503 will be tried on 2/23/21 in Salem Superior Court "A" session. Trial of claims in this Lead Case 1977CV01211 will follow 2/23/21 trial in 1977CV01503. In court status conference to reset tracking order and trial date will be held following conclusion of trial in 1977CV01503.		
02/07/2020	Endorsement on Request for Entry of Default (#10.0): DENIED Upon review and consideration, the request is DENIED.		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Judge: McCarthy-Neyman, Hon. Kathleen		
02/07/2020	The following form was generated: Notice to Appear Sent On: 02/07/2020 12:52:07		
03/31/2020	Event Result:: Rule 12 Hearing scheduled on: 03/31/2020 02:00 PM Has been: Canceled For the following reason: Joint request of parties Comments: Parties agreed to have judge rule on papers without a hearing. Hon. Kathleen McCarthy-Neyman, Presiding		
07/13/2020	Plaintiff Nahant Preservation Trust, Inc.'s Motion to intervene (Filed 7/13/20)	42	Image
07/13/2020	Opposition to motion to intervene of the town of Nahant in civil action no 1977CV1211A filed by Northeastern University	42.1	Image
07/13/2020	Plaintiff Nahant Preservation Trust, Inc.'s Reply to defendant's opposition to the towns motion to intervene	42.2	Image
07/13/2020	Attorney appearance On this date George X Pucci, Esq. added for Plaintiff Nahant Preservation Trust, Inc.		
07/13/2020	Affidavit of compliance with Superior Court Rule 9A Applies To: Pucci, Esq., George X (Attorney) on behalf of Nahant Preservation Trust, Inc. (Plaintiff)	42.3	Image
07/13/2020	Rule 9A notice of filing	42.4	Image
07/13/2020	Rule 9A list of documents filed.	42.5	Image
07/31/2020	MEMORANDUM & ORDER: (MEMORANDUM OF DECISION AND ORDER ON NORTHEASTERN'S MOTION TO DISMISS (Paper no. 8) Judge: McCarthy-Neyman, Hon. Kathleen CONCLUSION AND ORDER: For the reasons stated above, it is hereby ordered that Northeastern's motion to dismiss (Paper no. 8 is DENIED.	43	Image
07/31/2020	MEMORANDUM & ORDER: Memorandum of decision and order on defendant Mark Cullinan's motion for judgment on the pleadings (paper no. 19) Conclusion and order For the reasons stated above, it is hereby Ordered that Defendant Mark Cullinan's Motion for Judgment on the pleadings (Paper No. 19) is Allowed. It is further Ordered that Cllinan be dismissed from this consolidated action. Judge: McCarthy-Neyman, Hon. Kathleen DOCKETED ON THIS CASE IN ERROR. M OTION FOR JUDGMENT ON THE PLEADINGS WAS FILED IN CONSOLIDATED DOCKET NUMBER 1977CV1503. SEE #20 IN 1977CV01503A.	44	Image
07/31/2020	Endorsement on Motion to Intervene (#42.0): Other action taken Upon review and consideration the motion is Allowed. The Town of Nahant has a question of law or fact in common with NBT parties See M.R.Civ. P. 24(b).		Image
08/03/2020	Intervenor complaint filed. Applies To: Town of Nahant (Plaintiff-Intervenor)	45	Image
08/04/2020	Attorney appearance On this date George X Pucci, Esq. added for Plaintiff-Intervenor Town of Nahant		
08/17/2020	Received from Defendant Northeastern University: Answer to original complaint; of Nahant Preservation Trust, Inc. (filed 8/14/2020)	46	Image
08/17/2020	Attorney appearance On this date Kaileigh Ann Callender, Esq. added for Defendant Northeastern University		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/17/2020	General correspondence regarding Answer and Affirmative Defenses of Northeastern University to the Complaint of The Town of Nahant (filed 8/14/2020)	47	Image
08/19/2020	Plaintiffs Nahant Preservation Trust, Inc.'s Joint Motion for extension of discovery and tracking order. filed via email 8/17/20	48	Image
08/24/2020	Endorsement on Motion for extension of discovery and tracking order (#48.0): ALLOWED Allowed by joint agreement. Judge: Drechsler, Hon. Thomas		Image
09/09/2020	Defendant Northeastern University's Motion for summary judgment, MRCP 56 In Civil Action No. 1977-CV-01211A (filed 9/8/2020)	49	Image
09/09/2020	Northeastern University's Memorandum in support of It's Motion For Summary Judgment In Civil Action No. 1977-CV-01211A (filed 9/8/2020)	49.1	Image
09/09/2020	Statement of Undisputed Facts In Support Of Its Motion For Summary Judgment In Civil Action No. 1977-CV-01211A And Plaintiffs' Response (filed 9/8/2020)	49.2	Image
09/09/2020	Opposition to To Northeastern's Motion For Summary Judgment In Civil Action No. 1977-CV-01211A filed by Nahant Preservation Trust, Inc. (filed 9/8/2020)	49.3	Image
09/09/2020	Defendant Northeastern University's Reply in Support Of Its Motion For Summary Judgment In Civil Action No. 1977-CV-01211A (filed 9/8/2020)	49.4	Image
09/09/2020	Joint appendix for Summary Judgment motion package filed. (filed 9/8/2020)	49.5	Image
09/09/2020	Rule 9A notice of filing And List Of Documents Filed (filed 9/8/2020)	49.6	Image
09/15/2020	Plaintiff, Defendant Nahant Preservation Trust, Inc., Northeastern University, Town of Nahant's Submission of Joint Response dated 9/14/2020	50	Image
09/28/2020	Docket Note: Tracking Order deadlines updated and corrected in 1977CV01503 and 1977CV01211 (see email correspondence dated 9/14/2020 in both cases).		
09/28/2020	Docket Note: Expecting motion for issuance of joint tracking order in both cases, with opposition, pursuant to Rule 9A (see joint correspondence dated 9/14/2020)		
09/29/2020	<p>The following form was generated:</p> <p>Notice to Appear Sent On: 09/29/2020 12:54:59 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Notice Sent To: Kevin Patrick O'Flaherty, Esq. Goulston & Storrs 400 Atlantic Ave, Boston, MA 02110-3333 Notice Sent To: Kaileigh Ann Callender, Esq. Goulston And Storrs 400 Atlantic Ave, Boston, MA 02110 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109</p>		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Notice Sent To: Candace Cahill No addresses available		
09/29/2020	The following form was generated: Notice to Appear Sent On: 09/29/2020 12:56:28 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Notice Sent To: Kevin Patrick O'Flaherty, Esq. Goulston & Storrs 400 Atlantic Ave, Boston, MA 02110-3333 Notice Sent To: Kaileigh Ann Callender, Esq. Goulston And Storrs 400 Atlantic Ave, Boston, MA 02110 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Notice Sent To: Candace Cahill No addresses available		
10/21/2020	Plaintiff, Plaintiff-Intervenor Nahant Preservation Trust, Inc., Christian Bauta, Tess Bauta, Elizabeth K Berman, Anne Bromer, Candace Cahill, Michelle Capano, Alice Cort, Carl Jenkins, Marilyn Mahoney, Dan McMackin, Diane Monteith, Andrea Murphy, Jeffrey Musman, Patrick O'Reily, Marie Elizabeth Pasinski, M.D., Roger Pasinski, M.D., Vi Patek, Linda Pivacek, Emily Potts, Laura Poulin, Peter Rogal, Peggy Silva, Susan Solomon, Paul Spirn, Donna Steinberg, Jim Walsh, Town of Nahant's Motion for single tracking order for discovery and trial in the consolidated action, w/Certificate of Compliance with Superior Court Rule 9C	51	Image
10/21/2020	Opposition to the Nahant Preservation Trust Inc. and the Town of Nahant's motion for a single tracking order filed by Northeastern University	51.1	Image
10/21/2020	Plaintiff, Plaintiff-Intervenor Nahant Preservation Trust, Inc., Town of Nahant's Reply in support of motion for single tracking order for discovery and trial in the consolidated action	51.2	Image
10/29/2020	Defendant Northeastern University's Motion for summary judgment, MRCP 56 (filed 10/29/2020)	52	Image
10/29/2020	Northeastern University's Memorandum in support of Its Motion For Summary Judgment In Civil Action No.1977-CV-01211A (filed 10/29/2020)	52.1	Image
10/29/2020	Statement of Undisputed Facts / Material Facts In Support Of Its Motion For Summary Judgment In Civil Action No. 1977-CV-01211A (filed 10/29/2020)	52.2	Image
10/29/2020	Affidavit of (Third Affidavit) Of Kaileigh A. Callender, Esq. (filed 10/29/2020)	52.3	Image
10/29/2020	Affidavit of Geoffrey Trussell, Ph.D (filed 10/29/2020)	52.4	Image
10/29/2020	Nahant Preservation Trust, Inc.'s Memorandum in opposition to Defendant's Motion For Summary Judgment (filed 10/29/2020)	52.5	Image
10/29/2020	List of exhibits Town Of Nahant List Of Exhibits In Opposition To Defendant's Motion For Summary Judgment (filed 10/29/2020)	52.6	Image
10/30/2020	Affidavit of Rule 56(f) Affidavit (filed 10/29/2020)	52.7	Image
10/30/2020	Defendant Northeastern University's Reply in Support Of Its Motion For Summary Judgment In Civil Action No. 1977-CV-01211A (filed 10/29/2020)	52.8	Image
10/30/2020	Affidavit of Kaileigh A. Callender, Esq. (Fourth Affidavit) (filed 10/29/2020)	52.9	Image
10/30/2020	Affidavit of Timothy J. Mackay. AIA (Fourth Affidavit) (filed 10/29/2020)	52.11	Image
10/30/2020	Rule 9A notice of filing And List Of Documents Filed (filed 10/29/2020)	52.12	Image
11/02/2020	Endorsement on Motion for single tracking order for discovery and trial in the consolidated action. (#51.0): DENIED 10/30/20 After careful review and consideration of the parties' submissions and previous orders in civil action no. 1977cv1211 and the case transferred from the Land Court (now civil action no. 1977cv01503)		Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Nahant Preservation Trust Inc. Parties and Town of Nahant's motion for single tracking order for discovery and trial is DENIED. Judge: Howe, Hon. Janice W		
11/03/2020	Event Result:: Rule 56 Hearing scheduled on: 11/10/2020 11:00 AM Has been: Not Held For the following reason: By Court prior to date Hon. Janice W Howe, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate		
11/03/2020	The following form was generated: Notice to Appear Sent On: 11/03/2020 09:34:05 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Notice Sent To: Kevin Patrick O'Flaherty, Esq. Goulston & Storrs 400 Atlantic Ave, Boston, MA 02110-3333 Notice Sent To: Kaileigh Ann Callender, Esq. Goulston And Storrs 400 Atlantic Ave, Boston, MA 02110 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110		
11/19/2020	Plaintiff-Intervenor Town of Nahant's Assented to Motion to Confirm Intervenor Status In Transferred And Consolidated Land Court Action (filed 11/19/2020)	53	Image
11/20/2020	Plaintiff, Defendant, Defendant-Intervenor Nahant Preservation Trust, Inc., Northeastern University, Town of Nahant's Motion for Endorsement of Stipulated Protective Order - filed 11/19/2020	54	
11/25/2020	Event Result:: Rule 56 Hearing scheduled on: 12/01/2020 11:00 AM Has been: Not Held For the following reason: By Court prior to date Hon. Janice W Howe, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate		
12/07/2020	The following form was generated: Notice to Appear Sent On: 12/07/2020 09:31:14 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Notice Sent To: Kevin Patrick O'Flaherty, Esq. Goulston & Storrs 400 Atlantic Ave, Boston, MA 02110-3333 Notice Sent To: Kaileigh Ann Callender, Esq. Goulston And Storrs 400 Atlantic Ave, Boston, MA 02110 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110		
01/22/2021	Event Result:: Rule 56 Hearing scheduled on: 01/26/2021 10:00 AM Has been: Rescheduled For the following reason: By Court prior to date Comments: Changed to 2:00 same day same zoom info. Hon. Jeffrey Karp, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate		
01/25/2021	Plaintiff Nahant Preservation Trust, Inc.'s Motion for Leave to File Second Affidavit of Harley C. Racer in Opposition to Northeastern University's Motion for Summary Judgment (filed via email 1/25/21)	55	Image
01/26/2021	Endorsement on Motion of Intervenor Plaintiff, Town of Nahaht, to Confirm Intervenor Status in Transferred and Consolidated Land Court Action (#53.0): ALLOWED without opposition. The Court confirms that the Town has been added as a plaintiff in this action (No. 19-1211) and has filed a Complaint, which has been docketed as No. 45. Judge: Karp, Hon. Jeffrey		Image
01/26/2021	Endorsement on Motion for Endorsement of Stupulated Protective Order (#54.0): ALLOWED See Order at #56. Judge: Karp, Hon. Jeffrey		Image
01/26/2021	ORDER: STIPULATED PROTECTIVE ORDER Judge: Karp, Hon. Jeffrey	56	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
01/26/2021	<p>Event Result:: Rule 56 Hearing scheduled on: 01/26/2021 02:00 PM Has been: Held as Scheduled Comments: Held via Zoom.</p> <p>After hearing, Judge Karp will request that he be specially assigned to 1977CV01211A and 1977CV01503A.</p> <p>Judge Karp also will seek clarification from Chief Justice Carey regarding the scope of the Order of Transfer of Case No. 19MISC000390 from the Land Court to the Superior Court and whether he should be specially appointed to sit as a Land Court to adjudicate certain claims.</p> <p>Parties shall submit a proposed joint tracking order for both cases no later than February 9, 2021. Hon. Jeffrey Karp, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate</p>		
01/26/2021	<p>Event Result:: Motion Hearing scheduled on: 01/26/2021 02:00 PM Has been: Held as Scheduled Hon. Jeffrey Karp, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate Copied from linked case: 1977CV01503</p>		
01/27/2021	<p>Endorsement on Motion for leave to file second affidavit of Harley C. Racer in opposition to Northeastern University's motion for summary judgment (#55.0): ALLOWED (1/26/2021)</p> <p>Judge: Karp, Hon. Jeffrey</p>		Image
01/27/2021	<p>Affidavit of Harley C. Racer in opposition to Northeastern's Motion for Summary Judgment in Civil Action No. 1977-CV-01211A (Second Affidavit)</p>	57	Image
01/27/2021	<p>Endorsement on Motion for Summary Judgment in Civil Action No. 1977-CV-1211A (#49.0): No Action Taken After hearing, no action taken for the reasons stated. The Court will seek clarification of CJ Carey's Order of Transfer in accord with the agreement reached at the hearing. (1/26/2021)</p>		Image
01/27/2021	<p>Endorsement on Motion for summary judgment, MRCP 56 (#52.0): in Civil Action No. 1977-CV-01211A No Action Taken After hearing, no action taken for the reasons stated. The Court will seek clarification of CJ Carey's Order of Transfer in accord with the agreement reached at the hearing. (1/26/2021)</p>		Image
02/01/2021	<p>General correspondence regarding request by Justice Jeffrey T. Karp to Chief Justice Paula M. Carey re: 1977CV01503 (19 MISC 000390) dated 2/1/21</p>	58	Image
02/08/2021	<p>Plaintiff, Defendant, Plaintiff-Intervenor Nahant Preservation Trust, Inc., Town of Nahant, Northeastern University's Joint Notice to file a Proposed Tracking Order</p>	59	Image
02/09/2021	<p>The following form was generated:</p> <p>Notice to Appear - STATUS CONFERENCE TO BE HELD BEFORE JUDGE KARP.</p> <p>Sent On: 02/09/2021 12:29:10 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Notice Sent To: Kevin Patrick O'Flaherty, Esq. Goulston & Storrs 400 Atlantic Ave, Boston, MA 02110-3333 Notice Sent To: Kaileigh Ann Callender, Esq. Goulston And Storrs 400 Atlantic Ave, Boston, MA 02110 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110</p>		
02/09/2021	<p>The following form was generated:</p> <p>Notice to Appear - STATUS CONFERENCE TO BE HELD BEFORE JUDGE KARP</p> <p>Sent On: 02/09/2021 12:35:39 Notice Sent To: Kevin Patrick O'Flaherty, Esq. Goulston & Storrs 400 Atlantic Ave, Boston, MA 02110-3333 Notice Sent To: Kaileigh Ann Callender, Esq. Goulston And Storrs 400 Atlantic Ave, Boston, MA 02110 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Copied from linked case: 1977CV01503</p>		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/10/2021	Endorsement on Request for proposed tracking order (#59.0): Other action taken An Amended Tracking Order shall issue accordingly adopting the deadlines requested herein. (2/9/2021) Judge: Karp, Hon. Jeffrey		Image
02/24/2021	Attorney appearance On this date George X Pucci, Esq. added for Defendant-Intervenor Town of Nahant Copied from linked case: 1977CV01503		
03/01/2021	ORDER: PROCEDURAL ORDER No.1 (2/24/2021) Judge: Karp, Hon. Jeffrey	60	Image
03/01/2021	Event Result:: Conference to Review Status scheduled on: 09/14/2021 02:00 PM Has been: Not Held For the following reason: Case Disposed Hon. Jeffrey Karp, Presiding Staff: Dawn Mansfield, Sessions Clerk Copied from linked case: 1977CV01503		
03/01/2021	The following form was generated: Notice to Appear Sent On: 03/01/2021 16:30:53 Notice Sent To: Kevin Patrick O'Flaherty, Esq. Goulston & Storrs 400 Atlantic Ave, Boston, MA 02110-3333 Notice Sent To: Kaileigh Ann Callender, Esq. Goulston And Storrs 400 Atlantic Ave, Boston, MA 02110 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Copied from linked case: 2177CV00186		
03/23/2021	Defendant Northeastern University's Notice of intent to proceed with its motion for summary judgment in Case 1977CV01211A	61	Image
03/23/2021	Defendant Northeastern University's Certificate for the counsel regarding alternative methods of dispute resolution	62	Image
03/23/2021	's Copied from linked case: 2177CV00186		
03/23/2021	Plaintiff Northeastern University's Notice and that it does not at this time seek summary judgment in Land Court Case 19 MISC 000390/Superior Court Case No. 2177-CV-00186 Copied from linked case: 2177CV00186		
04/05/2021	Plaintiff files Uniform Counsel Certification. Applies To: Lurie, Esq., David E (Attorney) on behalf of Nahant Preservation Trust, Inc. (Plaintiff)	63	Image
06/30/2021	Northeastern University's Memorandum in support of Its Motions For Summary Judgment And To Dismiss Civil Action No. 1977-CV-01211A (SUPPLEMENTAL MEMORANDUM)	64	Image
06/30/2021	Affidavit Of Kevin P. O'Flaherty, Esq.	65	Image
06/30/2021	Defendant Northeastern University's Request for Hearing	66	Image
07/02/2021	Plaintiffs Nahant Preservation Trust, Inc., Town of Nahant's Response to Northeastern's Improperly Filed "Supplemental Memorandum", and Joint Request For Stay of Litigation.	67	Image
07/06/2021	Reply/Sur-reply To The Town Of Nahant's And The Nahant Preservation Trust Inc.'s Response to Northeastern's Supplemental Memorandum In Support of its Motions For Summary Judgment and to Dismiss Civil Action NO. 1977-CV-01211A and Northeastern's Opposition To The Town Of Nahant's And The Nahant Preservation Trust Inc.'s Motion To Stay. Applies To: O'Flaherty, Esq., Kevin Patrick (Attorney) on behalf of Northeastern University (Defendant)	68	Image
07/08/2021	Endorsement on Response to Northeastern's Improperly Filed "Supplemental Memorandum", and Joint Request For Stay of Litigation. (#67.0): Other action taken The motion to stay will be heard on 7/16/21 at 10:00 am in person.		Image
07/08/2021	Endorsement on Request for Hearing (#66.0): ALLOWED NU's motion for summary judgment (paper number 49 and 52) will be heard on 8/26/21 at 2:00 pm in person.		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Judge: Karp, Hon. Jeffrey		
07/16/2021	Event Result:: Motion Hearing scheduled on: 07/16/2021 10:00 AM Has been: Held as Scheduled Comments: Held in person - FTR Courtroom 4 Hon. Jeffrey Karp, Presiding Staff: Elissa Torto, Assistant Clerk Magistrate		
07/16/2021	Event Result:: Rule 56 Hearing scheduled on: 08/26/2021 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Jeffrey Karp, Presiding Staff: Elissa Torto, Assistant Clerk Magistrate		
07/16/2021	Event Result:: Conference to Review Status scheduled on: 09/14/2021 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Jeffrey Karp, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate		
07/16/2021	Endorsement on Response to Northeastern's Improperly filed Supplemental Memorandum and Joint Request for Stay of Litigation (#67.0): DENIED After hearing, denied without prejudice to be considered again after the summary judgment practice, for the reasons stated on the record. Judge: Karp, Hon. Jeffrey		
07/16/2021	Endorsement on Motion for Summary Judgment (#52.0): Other action taken As stated at today's hearing, this motion will be heard after the court decides whether the plaintiffs' Article 97 claims survive summary judgment. Therefore the hearing on 8/26/21 is cancelled. Judge: Karp, Hon. Jeffrey		
07/16/2021	Endorsement on Motion for Summary Judgment (#49.0): Other action taken As stated at today's hearing, this motion will be heard after the court decides whether the plaintiffs' Article 97 claims survive summary judgment. Therefore, the hearing scheduled for 8/26/21 is cancelled. Judge: Karp, Hon. Jeffrey		
07/16/2021	Event Result:: Motion Hearing scheduled on: 07/16/2021 10:00 AM Has been: Held as Scheduled Comments: Held in person. FTR Courtroom 4 Hon. Jeffrey Karp, Presiding Staff: Elissa Torto, Assistant Clerk Magistrate Copied from linked case: 2177CV00186		
07/16/2021	Event Result:: Rule 56 Hearing scheduled on: 08/26/2021 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Jeffrey Karp, Presiding Staff: Elissa Torto, Assistant Clerk Magistrate Copied from linked case: 2177CV00186		
07/16/2021	Event Result:: Conference to Review Status scheduled on: 09/14/2021 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Jeffrey Karp, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate Copied from linked case: 2177CV00186		
11/05/2021	The following form was generated: Notice to Appear Sent On: 11/05/2021 14:24:25 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Karen E Friedman, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: George X Pucci, Esq. KP Law, P.C. 101 Arch St, Boston, MA 02110 Notice Sent To: Kevin Patrick O'Flaherty, Esq. Goulston and Storrs 400 Atlantic Ave, Boston, MA 02110-3333 Notice Sent To: Kaileigh Ann Callender, Esq. Goulston And Storrs 400 Atlantic Ave, Boston, MA 02110		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/05/2021	The following form was generated: Notice to Appear Sent On: 11/05/2021 14:22:45 Notice Sent To: Kevin Patrick O'Flaherty, Esq. Goulston and Storrs 400 Atlantic Ave, Boston, MA 02110-3333 Notice Sent To: Kaileigh Ann Callender, Esq. Goulston And Storrs 400 Atlantic Ave, Boston, MA 02110 Notice Sent To: David E Lurie, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Notice Sent To: Harley Clarke Racer, Esq. Lurie Friedman LLP One McKinley Square, Boston, MA 02109 Copied from linked case: 2177CV00186		
11/18/2021	Self-Represented Plaintiff, Defendant, Plaintiff-Intervenor Nahant Preservation Trust, Inc., Northeastern University, Town of Nahant's Joint Motion to extend tracking deadline(s)	69	Image
12/01/2021	Event Result:: Conference to Review Status scheduled on: 12/01/2021 02:30 PM Has been: Held via Video/Teleconference Comments: FTR "H" Hon. Jeffrey Karp, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate		
12/02/2021	Docket Note: Summary Judgment Motion(s) to be scheduled before Judge Karp.		
12/02/2021	Docket Note: Schedule FPTC after disposition of Rule 56 motion(s) before Judge Karp.		
12/02/2021	Endorsement on Motion to extend tracking deadline(s) (#69.0): ALLOWED as modified herein.		Image
12/07/2021	Defendant Northeastern University's Assented to Motion for Leave To Exceed Page Limit For Memorandum In Support Of Motion For Summary Judgment	70	Image
12/09/2021	Endorsement on Motion for Leave To Exceed Page Limit For Memorandum In Support Of Motion For Summary Judgment (#70.0): ALLOWED Dated 12/9/2021		Image
12/14/2021	Scheduled: Judge: Karp, Hon. Jeffrey Event: Jury Trial Date: 10/31/2022 Time: 09:00 AM Result: Not Held		
01/13/2022	Plaintiffs, Defendant Nahant Preservation Trust, Inc., Northeastern University's Joint Motion to Amend Briefing Schedule on NEU,s Motion for Summary Judgment and NPT's Motion to Enlarge Page Limit For Opposition	71	Image
01/14/2022	Endorsement on Motion to amend the Briefing Schedule On NEU's Motion For Summary Judgment And NPT's Motion To Enlarge Page Limit For Opposition (#71.0): ALLOWED Dated 1/14/2022		Image
02/17/2022	Defendant Northeastern University's Motion for summary judgment on the dedication claim Applies To: O'Flaherty, Esq., Kevin Patrick (Attorney) on behalf of Northeastern University (Defendant)	72	Image
02/17/2022	Northeastern University's Memorandum in support of its Motion for Summary Judgment on the Dedication Claim Applies To: O'Flaherty, Esq., Kevin Patrick (Attorney) on behalf of Northeastern University (Defendant)	72.1	Image
02/17/2022	Opposition to Northeastern University's Motion for Summary Judgement on the Dedication Claim filed by Nahant Preservation Trust, Inc.	72.2	Image
02/17/2022	Town of Nahant's Memorandum in opposition to Northeastern University motion for summary judgment	72.3	Image
02/17/2022	Plaintiffs Nahant Preservation Trust, Inc., Town of Nahant's Response to Northeastern's Statement of Facts in support of its motion for summary judgement on the dedication claim	72.4	Image
02/17/2022	Joint appendix for Summary Judgment motion package filed. Exhibits 1-16 Appendix of Affidavits and Depositions Index of Exhibits 1-88	72.5	Image
02/17/2022	Exhibits/Appendix		Image
02/17/2022	Exhibits/Appendix		Image
02/17/2022	Exhibits/Appendix		Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/17/2022	Exhibits/Appendix		Image
02/17/2022	Exhibits/Appendix		Image
02/17/2022	Exhibits/Appendix		Image
02/17/2022	Exhibits/Appendix		Image
02/17/2022	Exhibits/Appendix		Image
02/17/2022	Exhibits/Appendix		Image
02/17/2022	Exhibits/Appendix		Image
02/17/2022	Request for hearing filed Applies To: O'Flaherty, Esq., Kevin Patrick (Attorney) on behalf of Northeastern University (Defendant)	72.6	Image
02/17/2022	Certificate of service of attorney or Pro Se: Kevin Patrick O'Flaherty, Esq.	72.7	Image
02/17/2022	Rule 9A list of documents filed.	72.8	Image
02/17/2022	Rule 9A notice of filing Applies To: O'Flaherty, Esq., Kevin Patrick (Attorney) on behalf of Northeastern University (Defendant)	72.9	Image
02/17/2022	Attorney appearance On this date John F White, III, Esq. added for Defendant Northeastern University		
03/01/2022	Endorsement on Response to Northeastern's Statement of Facts in support of its motion for summary judgement on the dedication claim (#72.4): Other action taken After thorough review, the Court HEREBY STRIKES the following response by the Defendants Nahant Preservation Trust and Town of Nahant for failing to comply with Superior Court Rule 9A(b)(5)(iii)(A) (d):1,2,7,8,9,12,16,17,20,27,28,32,36,41,43,46,49,51,56,61,68,70,71,73,75,78,80,83,85 and 87. Given the voluminous nature of the Defendants' memorandum and the number of statements of fact, close compliance with said Rule is necessary for the Court "to identify which facts are genuinely in dispute." Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 401 (2002). The Defendants are granted leave to file amended responses to said Statements of Facts or an amended memorandum that complies with Rule 9A(b)(5)(iii)(B). If the Defendants opt to file an amended memorandum, Northeastern University is granted leave to file a Reply Brief of no more than 10 pages. The Defendants shall file the applicable amended document within 21 days hereof (or, such longer time as the parties agree) and Northeastern University shall file the Reply Brief, if applicable, within 10 days thereafter (or, such longer time as the parties agree).		Image
03/01/2022	Endorsement on Request for hearing (#72.6): ALLOWED The hearing will be conducted on 5/20/22 @9:30am in person in Salem Superior Court "I" session. Judge: Karp, Hon. Jeffrey		Image
03/03/2022	The following form was generated: Notice to Appear Sent On: 03/03/2022 11:06:27		
03/03/2022	Case file images Notice to Appear 5/20/22 at 9:30AM		Image
03/16/2022	Plaintiff Nahant Preservation Trust, Inc., Town of Nahant's Response to Northeastern's Statement of Facts in support of its motion for Summary Judgment on the Dedication Claim (AMENDED)	73	Image
03/16/2022	Town of Nahant's Memorandum in opposition to Northeastern University's Motion for Summary Judgment (AMENDED MEMORANDUM)	74	Image
03/21/2022	Reply/Sur-reply to Town of Nahant's Amended Opposition Applies To: O'Flaherty, Esq., Kevin Patrick (Attorney) on behalf of Northeastern University (Defendant)	75	Image
04/19/2022	Plaintiffs, Defendants Nahant Preservation Trust, Inc., Northeastern University, Town of Nahant's Joint Motion for view in connection with pending summary judgment motion.	76	Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/20/2022	Endorsement on Motion for view in connection with pending Summary Judgment motion (#76.0): ALLOWED ///// VACATED ///// SEE ENDORSEMENT (#76 ON 5/11/22) /////////////// The parties shall file a proposed order that recognizes that the Court will be accompanied by Court Security and an Assistant Clerk, and that the proceedings will be recorded by Court Staff. Counsel shall contact First Assistant Clerk Patten about scheduling		Image
04/28/2022	Proposed Filings/Orders	77	Image
05/04/2022	Endorsement on Reply to Town of Nahant's Amended Opposition (#75.0): Other action taken Northeastern University's request that the court disregard the Town's Amended Opposition at #74 is ALLOWED substantially for the reasons argued by Northeastern University. The request for the court to disregard the Cnty Affidavit is DENIED. Judge: Karp, Hon. Jeffrey		Image
05/04/2022	Endorsement on Memorandum for Summary Judgment. (Amended Memorandum) (#74.0): Other action taken The court will disregard this Amended Opposition for the reasons stated in its marginal ruling on #75. Judge: Karp, Hon. Jeffrey		Image
05/05/2022	ORDER: PROCEDURAL ORDER ON MOTION FOR A VIEW //////// VACATED ////////// SEE ENDORSEMENT (#76 ON 5/11/22) ///////////////These consolidated matters are scheduled for a hearing before the Court on May 20, 2022, on Northeastern University's motion for summary judgment. On April 20, 2022, the Court allowed the parties' Joint Motion For View In Connection With Pending Summary Judgment Motion (Paper No. 76) and requested that the parties submit a proposed order regarding same. The Court has now thoroughly reviewed the parties' summary judgment submissions and the applicable legal authority. After this review, the Court is not convinced that a view of the subject property is necessary for the Court's consideration of the issues at stake on summary judgment (e.g., NU's intent, the public's acceptance of the purported dedication, etc.). Moreover, the location likely will not represent the way that it appeared (and the conditions that existed) at the time of the operative events.[1] WHEREFORE, it is HEREBY ORDERED that: 1. As soon as reasonably possible, but no later than May 11, 2022, the parties shall file, jointly or separately, a notice setting forth precisely what aspects of the property they seek the Court to view, the specific reasons therefore, how those reasons are relevant to the issues on summary judgment, and an explanation of why the information cannot be gleaned by the Court from the summary judgment record, such as aerial photographs, photographs, and land plans, or chalks of same displayed at the hearing. 2. The Court's order at Paper No. 76 that the parties file a proposed order regarding the view is HEREBY STAYED until further order of the Court.	78	Image
05/05/2022	Plaintiffs Nahant Preservation Trust, Inc., Christian Bauta, Tess Bauta, Elizabeth K Berman, Anne Bromer, Candace Cahill, Michelle Capano, Alice Cort, Mark Cullinan, Carl Jenkins, Marilyn Mahoney, William Mahoney, Dan McMackin, Diane Monteith, Andrea Murphy, Jeffrey Musman, Patrick O'Reilly, Marie Elizabeth Pasinski, M.D., Roger Pasinski, M.D., Vi Patek, Linda Pivacek, Emily Potts, Laura Poulin, Peter Rogal, Peggy Silva, Susan Solomon, Paul Spirn, Donna Steinberg, Jim Walsh, Town of Nahant's Notice of Requested Aspects For View In Connection With Pending Summary Judgment Motion	79	Image
05/10/2022	Defendant Northeastern University's Notice for regarding court's order declining to conduct a view	80	Image
05/11/2022	Endorsement on Motion for view in connection with pending summary judgment motion. (#76.0): Other action taken After further consideration and in light of the parties' notices (see paper nos. 79 and 80), this Court's Order of 4/20/22 hereon is HEREBY VACATED and this motion is DENIED for the reasons stated in Procedural Order on Motion For View, (paper no 78). Counsel shall appear for the summary judgment hearing on 5/20/22 at 9:30 AM in Session I, as planned. Judge: Karp, Hon. Jeffrey		Image
05/20/2022	Matter taken under advisement: Rule 56 Hearing scheduled on: 05/20/2022 09:30 AM Has been: Held - Under advisement Comments: FTR COURTROOM I Hon. Jeffrey Karp, Presiding Staff: Michael Ruane, Assistant Clerk		
05/20/2022	Event Result:: Rule 56 Hearing scheduled on: 05/20/2022 09:30 AM Has been: Held as Scheduled Comments: FTR COURTROOM I (HEARING HELD IN COURTROOM I)		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Hon. Salim Tabit, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate		
05/20/2022	Matter taken under advisement: Rule 56 Hearing scheduled on: 05/20/2022 09:00 AM Has been: Held - Under advisement Comments: FTR COURTROOM I ***** (HEARING HELD IN COURTROOM I) Hon. Jeffrey Karp, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate		
07/12/2022	Plaintiffs, Defendant Nahant Preservation Trust, Inc., Town of Nahant, Northeastern University's Joint Motion to Reschedule Final Pre-Trial Conference	81	Image
07/28/2022	Endorsement on Motion to continue / reschedule an event Final Pre-Trial Conference (#81.0): ALLOWED The Final Pre-Trial Conference is continued to 9/21/22 at 2:00 p.m. in person at Newburyport Superior Court (145 High Street, Newburyport). (Attest: ATMitchell, Asst. Clerk) Judge: Karp, Hon. Jeffrey		Image
07/28/2022	Event Result:: Final Pre-Trial Conference scheduled on: 08/24/2022 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Jeffrey Karp, Presiding Staff: Lisa Partelow, Assistant Clerk		
07/28/2022	Event Result:: Final Pre-Trial Conference scheduled on: 08/24/2022 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Jeffrey Karp, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate		
07/28/2022	The following form was generated: Notice to Appear Sent On: 07/28/2022 13:35:26		
07/28/2022	Case file images Notice to Appear for Final Pre-Trial Conference 9/21/22 2:00PM In Person		Image
09/01/2022	Event Result:: Jury Trial scheduled on: 10/31/2022 09:00 AM Has been: Not Held For the following reason: By Court prior to date Hon. Jeffrey Karp, Presiding Staff: Debra Vernava, Assistant Clerk Magistrate		
09/01/2022	Event Result:: Final Trial Conference scheduled on: 10/14/2022 10:00 AM Has been: Not Held For the following reason: By Court prior to date Hon. Jeffrey Karp, Presiding Staff: Debra Vernava, Assistant Clerk Magistrate		
09/01/2022	Event Result:: Final Pre-Trial Conference scheduled on: 09/21/2022 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Jeffrey Karp, Presiding Staff: Anne Mitchell, Assistant Clerk Magistrate		
09/01/2022	The following form was generated: Notice to Appear Sent On: 09/01/2022 14:24:00		
09/01/2022	Case file images Notice to Appear for Trial Assignment Conference		Image
09/20/2022	MEMORANDUM & ORDER: MEMORANDUM OF DECISION AND ORDER ON NORTHEASTERN UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT ON THE DEDICATION CLAIM (PAPER No. 72): For the above reasons: 1. In Superior Court Case No. 1977CV01211: a. It is HEREBY ORDERED that Northeastern University's Motion For Summary Judgment On The	82	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	<p>Dedication Claim (Paper No. 72) is ALLOWED.</p> <p>b. It is HEREBY DECLARED and ADJUDGED that:</p> <p>(i) Northeastern University has not dedicated, and the public has not accepted, the land on top of and to the east of Murphy Bunker at East Point, Nahant, MA, to the public for use as an ecological preserve and for passive recreation;</p> <p>(ii) a public easement on said land has not been created; and,</p> <p>(iii) said land is not subject to Article 97 of the Amendments to the Massachusetts Constitution.</p> <p>c. Count II, so much of Count III that seeks a declaration that said land is subject to Article 97 and the EOEEA's Article 97 Land Disposition Policy, Count IV, and Count V of the NHP Parties' Verified Complaint (Paper No. 1) are HEREBY DISMISSED.</p> <p>d. Count I, so much of Count II that seeks a declaration that said land is subject to Article 97 and the EOEEA's Article 97 Land Disposition Policy, Count III, and Count IV of the Town of Nahant's Complaint (Paper No. 45) are HEREBY DISMISSED.</p> <p>2. In Land Court Case No. 19MISC00390:</p> <p>a. It is HEREBY DECLARED and ADJUDGED that:</p> <p>(i) Northeastern University has not dedicated, and the public has not accepted, the land on top of and to the east of Murphy Bunker at East Point, Nahant, MA, to the public for use as an ecological preserve and for passive recreation;</p> <p>(ii) said land is not subject to Article 97 of the Amendments to the Massachusetts Constitution.</p> <p>b. Summary Judgment SHALL ENTER on behalf of Northeastern University on Count I of the Complaint (Paper No. 1).</p> <p>Judge: Karp, Hon. Jeffrey</p>		
09/20/2022	<p>Endorsement on Motion for Summary Judgment on the Dedication Claim (#72.0): ALLOWED See Memorandum of Decision and Order at #82.</p> <p>Judge: Karp, Hon. Jeffrey</p>		Image
09/20/2022	<p>Summary Judgment. It is ORDERED, ADJUDGED and DECLARED: That (i) Northeastern University has not dedicated, and the public has not accepted, the land on top of and to the east of Murphy Bunker at East Point, Nahant, MA, to the public for use as an ecological preserve and for passive recreation; and (ii) said land is not subjected to Article 97 of the Amendments to the Massachusetts Constitution. Accordingly, Summary Judgment SHALL ENTER on behalf of Northeastern University on Count I of the Complaint in 19MISC00390 (Paper No. 1).</p> <p>Jeffrey Karp Associated Justice, Superior Court Dated: September 20, 2022</p> <p>***Please Reference Summary Judgment (#12) 2177cv00186) ****</p>		Image
10/17/2022	<p>Notice of appeal filed.</p> <p>Applies To: Pucci, Esq., George X (Attorney) on behalf of Town of Nahant (Plaintiff-Intervenor)</p>	83	Image
10/18/2022	Docket Note: Mass.R.Civ.P. 3(d) notice sent to all parties.		
10/19/2022	<p>Notice of appeal filed. AMENDED NOTICE OF APPEAL</p> <p>Applies To: Pucci, Esq., George X (Attorney) on behalf of Town of Nahant (Plaintiff-Intervenor)</p>	84	Image
10/31/2022	Docket Note: Expecting possible stipulation from NPT		
10/31/2022	<p>Docket Note: Supplemental Briefing on Summary Judgment ordered on 10/31/22 (Karp, J.) Town of Nahant's supplemental summary judgment papers to be served upon Northeastern University on promissory estoppel claim pursuant to Superior Court Rule 9A no later than 12/5/22. Northeastern University shall file Rule 9A package via hand-delivery in Salem Superior Court (and not via e-file without any courtesy copies) no later than 1/9/23. Summary judgment hearing to be held before Judge Karp on 1/18/23 in-person (B Session - NBPT).</p>		
10/31/2022	<p>Event Result:: Trial Assignment Conference scheduled on: 10/31/2022 02:00 PM Has been: Held via Video/Teleconference Comments: FTR "D", Courtroom 1 Hon. Jeffrey Karp, Presiding Staff: Debra Vernava, Assistant Clerk Magistrate</p>		
11/01/2022	<p>Docket Note: See Paper #19 in consolidated action 2177CV00186 ORDER: ORDER AFTER HEARING ON 10/31/22 It is hereby ORDERED that assembly of the record of the appeal of the Separate and Final Judgment (see</p>		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Papers #12 and #14) in 2177CV00186 and in the Land Court action, 19MISC000390, is hereby STAYED pending further order of the court.		
11/29/2022	Event Result:: Rule 56 Hearing scheduled on: 01/18/2023 02:00 PM Has been: Not Held For the following reason: Transferred to another session Hon. Jeffrey Karp, Presiding Staff: Jose Mejia, Assistant Clerk Magistrate		
12/08/2022	Party(s) file Stipulation and Order Regarding Remaining Claims Applies To: Nahant Preservation Trust, Inc. (Plaintiff); Bauta, Christian (Plaintiff); Bauta, Tess (Plaintiff); Berman, Elizabeth K (Plaintiff); Bromer, Anne (Plaintiff); Cahill, Candace (Plaintiff); Capano, Michelle (Plaintiff); Cort, Alice (Plaintiff); Cullinan, Mark (Plaintiff); Jenkins, Carl (Plaintiff); Mahoney, Marilyn (Plaintiff); Mahoney, William (Plaintiff); McMackin, Dan (Plaintiff); Monteith, Diane (Plaintiff); Murphy, Andrea (Plaintiff); Musman, Jeffrey (Plaintiff); O'Reily, Patrick (Plaintiff); Pasinski, M.D., Marie Elizabeth (Plaintiff); Pasinski, M.D., Roger (Plaintiff); Patek, Vi (Plaintiff); Pivacek, Linda (Plaintiff); Potts, Emily (Plaintiff); Poulin, Laura (Plaintiff); Rogal, Peter (Plaintiff); Silva, Peggy (Plaintiff); Solomon, Susan (Plaintiff); Spirn, Paul (Plaintiff); Steinberg, Donna (Plaintiff); Walsh, Jim (Plaintiff); Northeastern University (Defendant); Town of Nahant (Plaintiff-Intervenor)	85	Image
12/16/2022	Endorsement on Stipulation and Order Regarding Remaining Claims (#85.0): ALLOWED See Order on Page 3 hereof. In 1977CV01211, it is hereby ORDERED that: Wherefore, the only remaining claim in this action is Count V of the Town's Complaint (Paper No. 45). Sent to the parties via email on 12/20/22 Applies To: Nahant Preservation Trust, Inc. (Plaintiff); Bauta, Christian (Plaintiff); Bauta, Tess (Plaintiff); Berman, Elizabeth K (Plaintiff); Bromer, Anne (Plaintiff); Cahill, Candace (Plaintiff); Capano, Michelle (Plaintiff); Cort, Alice (Plaintiff); Cullinan, Mark (Plaintiff); Jenkins, Carl (Plaintiff); Mahoney, Marilyn (Plaintiff); Mahoney, William (Plaintiff); McMackin, Dan (Plaintiff); Monteith, Diane (Plaintiff); Murphy, Andrea (Plaintiff); Musman, Jeffrey (Plaintiff); O'Reily, Patrick (Plaintiff); Pasinski, M.D., Marie Elizabeth (Plaintiff); Pasinski, M.D., Roger (Plaintiff); Patek, Vi (Plaintiff); Pivacek, Linda (Plaintiff); Potts, Emily (Plaintiff); Poulin, Laura (Plaintiff); Rogal, Peter (Plaintiff); Silva, Peggy (Plaintiff); Solomon, Susan (Plaintiff); Spirn, Paul (Plaintiff); Steinberg, Donna (Plaintiff); Walsh, Jim (Plaintiff); Northeastern University (Defendant); Town of Nahant (Plaintiff-Intervenor)		Image
01/09/2023	Town of Nahant's Memorandum in opposition to Northeastern University's Motion for Summary Judgment on Count V of the Intervenor's Complaint	86	Image
01/09/2023	Affidavit of Linda Pivacek in Opposition to Northeastern's Motion for Summary Judgment on the Town of Nahant's Promissory Estoppel Claim	86.1	Image
01/09/2023	Affidavit of Paul Morse in Opposition to Northeastern's Motion for Summary Judgment on the Town of Nahant's Promissory Estoppel claim	86.2	Image
01/09/2023	Affidavit of William Mahoney in Opposition to Northeastern's Motion for Summary Judgment on the Town of Nahant's Promissory Estoppel Claim	86.3	Image
01/09/2023	Reply/Sur-reply in Support of its Motion for Summary Judgment on the Town's Promissory Estoppel Claim	86.4	Image
01/09/2023	Certificate of Compliance Superior Court Rule 9A (b)(5)(v)(B)	86.5	Image
01/09/2023	Certificate of service of attorney or Pro Se: John F White, III, Esq.	86.6	Image
01/09/2023	Rule 9A notice of filing	86.7	Image
01/09/2023	Rule 9A list of documents filed.	86.8	Image
01/18/2023	Matter taken under advisement: Rule 56 Hearing scheduled on: 01/18/2023 02:00 PM Has been: Held - Under advisement Comments: FTR - 2:00:59 - 3:17:12 p.m., courtroom 1 Hon. Jeffrey Karp, Presiding Staff: Anne Mitchell, Assistant Clerk Magistrate		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
01/19/2023	MEMORANDUM & ORDER: DECISION AND ORDER ON NORTHEASTERN UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT (Paper No. 52) WHEREFORE for the forgoing reasons, Northeastern University's Motion for Summary Judgment (Paper No. 52) is ALLOWED as to Count V of the Town of Nahant's Complaint, and Count V is HEREBY DISMISSED. (See Paper No. 87 for full text of Decision and Order) Judge: Karp, Hon. Jeffrey	87	Image
01/19/2023	Docket Note: Paper No. 87 emailed to counsel		
01/19/2023	Endorsement on Motion for Summary Judgment (#52.0): ALLOWED ALLOWED as to Count V of the Town of Nahant's Complaint. See Order at #87. Judge: Karp, Hon. Jeffrey		Image
01/23/2023	SUMMARY JUDGMENT for Defendant-Intervenor(s), Northeastern University against Plaintiff-Intervenor(s), Town of Nahant, without statutory costs. It is ORDERED and ADJUDGED: That the remaining claim, Count V, be and hereby is DISMISSED. Final judgment in this case is hereby entered.	88	Image
01/27/2023	Defendant Town of Nahant's Notice of Motion for reconsideration and to conform complaint to the evidence.	89	Image
02/07/2023	Plaintiff-Intervenor Town of Nahant's Motion for Reconsideration And To Conform Complaint To The Evidence	90	Image
02/07/2023	Opposition to To Town's Motion For Reconsideration And Motion To Amend Pleadings filed by Northeastern University	90.1	Image
02/07/2023	Rule 9A Affidavit Applies To: Town of Nahant (Plaintiff-Intervenor); Pucci, Esq., George X (Attorney) on behalf of Town of Nahant (Plaintiff-Intervenor)	90.2	Image
02/07/2023	Plaintiff-Intervenor Town of Nahant's Notice of Filing	90.3	Image
02/07/2023	Plaintiff-Intervenor Town of Nahant's Submission of List Of Documents Filed	90.4	Image
02/07/2023	Plaintiff-Intervenor Town of Nahant's Certificate of Service	90.5	Image
02/13/2023	Endorsement on Motion for Reconsideration and to Conform Complaint to Evidence (#90.0): Other action taken The Town has failed to comply with Superior Court Rule 9C. "Initiating" a telephone conference is not compliance with the Rule. No action will be taken until the Town conducts the conference and files the certificate required by Rule 9C. Judge: Karp, Hon. Jeffrey		Image
02/14/2023	Plaintiff-Intervenor Town of Nahant's Motion for Reconsideration and to Conform Complaint to the Evidence	91	Image
02/14/2023	Opposition to to Town's Motion for Reconsideration and Motion to Amend Pleadings filed by Northeastern University	91.1	Image
02/14/2023	Affidavit of compliance with Superior Court Rule 9A Applies To: Pucci, Esq., George X (Attorney) on behalf of Town of Nahant (Plaintiff-Intervenor)	91.2	Image
02/14/2023	Rule 9A notice of filing	91.3	Image
02/14/2023	Rule 9A list of documents filed.	91.4	Image
02/14/2023	Certificate of service of attorney or Pro Se: George X Pucci, Esq.	91.5	Image
03/02/2023	ORDER: ORDER ON TOWN OF NAHANT'S MOTION FOR RECONSIDERATION AND TO CONFIRM COMPLAINT TO THE EVIDENCE (Paper No. 91) *** For the foregoing reasons, the Town Of Nahant's Motion for Reconsideration And To Conform Complaint To The Evidence (Paper No. 91) is DENIED. See Paper No. 92 for full text of the Court's Order.	92	Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Judge: Karp, Hon. Jeffrey		
03/02/2023	Docket Note: Paper No. 92 emailed to counsel		
03/02/2023	Endorsement on Motion for Reconsideration and to Conform Complaint to the Evidence (#91.0): DENIED See Order at Paper No. 92. Judge: Karp, Hon. Jeffrey		Image
03/09/2023	Notice of appeal filed. Applies To: Town of Nahant (Plaintiff-Intervenor)	93	Image
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Nahant Preservation	2177CV00936	09/16/2021	Related Case
Nahant Preservation	2177CV00958	09/23/2021	Related Case
Nahant Preservation	2177CV00960	09/23/2021	Related Case
Nahant Preservation	2177CV01021	10/14/2021	Related Case
Nahant Preservation	2277CV00976	10/13/2022	Related Case
Nahant Preservation	2277CV00111	02/07/2022	Related Case

Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Summary Judgment	01/23/2023	Karp, Hon. Jeffrey

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1977CV01211

82

NAHANT PRESERVATION TRUST, INC.,
TOWN OF NAHANT, and others¹

vs.

NORTHEASTERN UNIVERSITY

Consolidated with:

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2177CV00186

11

NORTHEASTERN UNIVERSITY

vs.

NAHANT PRESERVATION TRUST, INC., and others²

Consolidated with:

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

LAND COURT
No. 19MISC00390

NORTHEASTERN UNIVERSITY

vs.

NAHANT PRESERVATION TRUST, INC., and others³

¹ Christian Bauta, Tess Bauta, Elizabeth K. Berman, Anne Bromer, Candace Cahill, Michelle Capano, Alice Cort, Carl Jenkins, Marilyn Mahoney, William Mahoney, Dan McMackin, Diane Monteith, Andrea Murphy, Jeffrey Musman, Patrick O'Reilly, Marie Elizabeth Pasinski, M.D., Roger Pasinski, M.D., Vi Patek, Linda Pivacek, Emily Potts, Laura Poulin, Peter Rogal, Peggy Silva, Susan Solomon, Paul Spirn, Donna Steinberg, and Jim Walsh.

² All those listed in n.1.

³ Mark Cullinan and all those listed in n.1.

**MEMORANDUM OF DECISION AND ORDER ON
NORTHEASTERN UNIVERSITY'S MOTION FOR SUMMARY
JUDGMENT ON THE DEDICATION CLAIM (PAPER No. 72)**

According to Article 97 of the Amendments to the Massachusetts Constitution ("Article 97"), which was ratified by voters in 1972, a two-thirds vote of both houses of the Legislature is required to allow land that was acquired or designated ("dedicated") for a public purpose to be used for other purposes.

These consolidated actions arise from a dispute over a peninsula of land in Nahant, Massachusetts, known as East Point, a portion of which has been owned and used by Northeastern University ("Northeastern") for its Marine Science Center ("MSC") since the mid-to-late 1960s, and the applicability of Article 97 to that portion. After Northeastern announced plans in 2018 to expand its facilities on East Point, a number of Nahant residents and the Nahant Preservation Trust, Inc. ("NPT"), announced its opposition to Northeastern's plans on grounds that the land in question had been dedicated to public use (as an ecological preserve and for passive recreation), thus, a two-thirds vote of the legislature is required under Article 97 for Northeastern to develop it.

The opposition to its plans prompted Northeastern to file suit in August 2019 against twenty-eight Nahant residents and the NPT (collectively, "NPT Parties") in the Land Court (Case No. 19MISC00390), seeking a declaration that it had not made a public dedication of the land at issue.⁴ Shortly thereafter, the NPT Parties filed suit against Northeastern in the Superior Court (Case No. 1977CV01211), challenging Northeastern's plans on a number of grounds, including Article 97.

⁴ Upon transfer to the Superior Court, the Land Court action was given a Superior Court Docket number (No. 2177CV00186) for administrative purposes.

Thereafter, the Land Court ruled that the NPT Parties have a right to a jury trial on certain issues of fact in the Land Court action, and the Chief Justice of the Trial Court ordered the transfer and consolidation of the Land Court action with the Superior Court action, and authorized the undersigned Superior Court judge to sit as a Land Court judge to adjudicate both cases.⁵ On July 31, 2020, the Town of Nahant ("Town") was allowed to intervene as a plaintiff in the Superior Court action.⁶

The matter is now before the Court on Northeastern University's Motion For Summary Judgment On The Dedication Claim (Paper No. 72) ("Motion"). Following a lengthy hearing on the motion on May 20, 2022, and a thorough review of the voluminous record, for the reasons that follow, the Motion is **ALLOWED**.

FACTUAL BACKGROUND

The following undisputed facts, and the disputed facts in the light most favorable to the Nahant Plaintiffs as the non-moving parties, are taken from the NPT Parties' And The Town Of Nahant's Amended Responses To Northeastern's Statement Of Facts In Support Of Its Motion For Summary Judgment On The Dedication Claim (Paper No. 73) and the summary judgment record.^{7, 8}

⁵ See Procedural Order No. 1 (Paper No. 60) for more information about the procedural history of these matters. References herein to "Paper No." are to items docketed in Superior Court Case No. 1977CV01211.

⁶ The Court refers to the NPT, the individual Nahant resident plaintiffs, and the Town collectively as the "Nahant Plaintiffs."

⁷ Additional relevant facts are discussed, *infra*, in the Court's Discussion section.

⁸ The Court cites to the statement of facts as "SOF," followed by a paragraph number, and to the Joint Appendix as "J.A.," followed by an exhibit number.

In January 2018, Northeastern made public its plan to build on its 20.4-acre Nahant MSC campus ("MSC Campus") a new laboratory, classroom, and research building of some 55,000 square feet ("Project"). (SOF, ¶ 1). The new building will be located partially within and adjacent to an old military bunker ("Murphy Bunker") and partially on the land above it. (SOF, ¶ 2). A subsurface geothermal well field will be constructed to the east of Murphy Bunker and thermal energy will be used to heat and cool the new building. (SOF, ¶ 3). After construction of the thermal wells, Northeastern plans to eliminate invasive plants that currently exist in the area east of Murphy Bunker and to plant and maintain native plants in the area. (SOF, ¶ 4).

Almost as soon as the Project was announced, certain individuals, including some who are nearby neighbors to the MSC and affiliated with the NPT, voiced opposition. (SOF, ¶ 5). In the summer of 2018, Northeastern met with a number of those individuals, including certain individuals affiliated with the NPT. (SOF, ¶ 6). At no time during these discussions did any of these individuals, including those who were part of or affiliated with the NPT, or any Town official or other person, assert that the Project could not go forward because the area of the proposed Project had been dedicated for public use. (SOF, ¶ 7). In December 2018, Northeastern presented its plans for the Project at a public meeting of the Nahant Board of Selectmen, which was attended by a number of Nahant citizens, including certain members of the NPT. (SOF, ¶ 7). No one stated publicly, on the record at that meeting that the Project could not proceed because of an alleged dedication by Northeastern. (SOF, ¶ 7).

In July 2019, the NPT Parties sent a letter to Northeastern asserting that, more than fifty years earlier, Northeastern had made a dedication to the public of the area where the Project would be located for use as an ecological preserve and passive recreation. (J.A., Ex. 3). As a result, the NPT Parties claimed, the Project could not proceed because the land was so-called Article 97 land of the Commonwealth which Northeastern was prohibited from altering without legislative approval. (SOF, ¶ 9). The July 2019 letter (on which the Massachusetts Attorney General, the Nahant Board of Selectmen, and other municipal officials were copied) expressed an intent to commence a lawsuit against Northeastern. (SOF, ¶¶ 8, 10).

In August 2019, Northeastern commenced the above-captioned Land Court action (19MISC00390) seeking a declaratory judgment that it had never made the alleged dedication. (SOF, ¶ 11). Thereafter, also in August 2019, the NPT Parties commenced the above-captioned Superior Court action (1977CV01211) seeking, among other things, a declaration that over fifty years earlier Northeastern had made unequivocal and clear statements of intent to dedicate to the public the land on top of and to the east of Murphy Bunker. (SOF, ¶ 12). Neither the Attorney General's Office nor the Town of Nahant were parties in either lawsuit when those cases were commenced. (SOF, ¶ 13). The Town subsequently moved to intervene in both lawsuits, which was allowed on July 31, 2020. (SOF, ¶ 15). The Attorney General's Office has not sought to intervene or otherwise involve itself in the litigation.⁹

⁹ This is despite the fact that the NPT Parties' July 2019 letter notifying Northeastern of their intent to sue specifically included a "request that the Attorney General take steps to enforce the Commonwealth's public easement in East Point and to prevent any change in use or transfer of the Article 97 property that has been dedicated to public use by [Northeastern] as an ecological preserve." (J.A., Ex. 3, p. 10).

The MSC Campus is a 20.4-acre site at the end of Nahant Road and east of Swallow Cave Road in the area generally known as East Point. (SOF, ¶ 16). Lodge Park, an 8.3-acre public park owned by the Town, abuts the MSC Campus. (SOF, ¶ 16). The MSC Campus was originally part of two estates: the estate of the family of Henry Cabot Lodge and an adjacent estate owned by Harmon Elliot. (SOF, ¶ 17). In 1941, the United States acquired the Lodge and Elliot estates by eminent domain – taking a total of 28.7-acres in all. (SOF, ¶ 18). Thereafter, the federal government turned the land over to the United States military, which began to use the whole area for military purposes. (SOF, ¶ 19).

Among other things, the military constructed underground bunkers and other military facilities on the site, including Murphy Bunker. (SOF, ¶ 20). This work entailed significant amounts of blasting, excavation, earth moving, and filling. (SOF, ¶ 21). The construction of these facilities and the military activities left the land on top of and to the east of Murphy Bunker relatively barren, and the area to the east of Murphy Bunker was cleared and leveled to allow an unobstructed firing zone for the massive canons located at the ends of the bunker. (SOF, ¶ 22). In the 1950s, the area to the east of Murphy Bunker was once again cleared and leveled for installation of several 90-mm anti-aircraft guns and bunkers. (SOF, ¶ 23). In 1954, the Army announced plans for a NIKE guided missile site to be constructed on the 8.3-acre site that eventually became Lodge Park. (SOF, ¶ 24). Massive amounts of fill were brought across the area that would become the MSC Campus in connection with that project. (SOF, ¶ 25).

In the early 1960s, the military facilities were decommissioned. (SOF, ¶ 26). In 1963, the Town applied to acquire the whole 28.7-acre site for a park, and the federal

government offered the area to the Town. (J.A., Ex. 11). At the 1964 Nahant Town Meeting, however, the Town voted to indefinitely postpone action on a motion to authorize the funds necessary to purchase the property, and the Town Board of Selectmen subsequently notified the General Services Administration ("GSA") that the Town had no further interest in the property. (J.A., Exs. 12-13).

According to the transcript from the 1964 Town Meeting, the then-chair of the Conservation Commission, Ruth Alexander, stated, in pertinent part:

I am sure that all the Townspeople in Nahant wish that this area could be left, but we are all afraid of what would happen if it is left for us to own and then all of Boston, Somerville, Chelsea, etc. occupy it because we would leave this wide open to the world as the Advisory Committee has told us.

(J.A., Ex. 13, p. 65). Commenting on whether the Town should purchase the property or not, the then-chair of the Board of Selectmen, Charles Kelley, noted, in part: "The second factor that really concerns us is the fact that we would have to use this for park or recreational purposes. It would have to be open to any citizen of the United States."

(J.A., Ex. 13, p. 71). The Town's Annual Report, dated December 1964, states:

Last year the Town decided not to appropriate money for the purpose of acquiring [the government property at East Point] The [Conservation] Commission feels, however, that at least it would be desirable to acquire for the towns people, if possible without expenditure of money, the right to walk along a scenic pathway which would follow as much of the shoreline as is included in this property. Whether or not this will be possible depends not only on the desires of the Town but also on the willingness of the government to grant a revocable license or easement for this purpose.

(J.A., Ex. 14, pp. 87-88).

Thereafter, a subcommittee was formed to see if the Conservation Commission could interest a college or university in acquiring the property, based on the belief that

an educational institution might be more inclined than a private developer to provide a walking path on the property. (J.A., Ex. 15, p. 94, and Ex. 18). The subcommittee brought the property to the attention of Northeastern, which expressed an interest in acquiring it as a site for marine science research and education. (J.A., Ex. 15, p. 94, and Ex. 16, p. 104).

In April 1965, Northeastern prepared a document entitled, "Proposal for a Marine Science Research Institute" ("April 1965 Proposal"). (J.A., Ex. 16). At that time, the 28.7-acre area was relatively barren. (SOF, ¶ 37). In the April 1965 Proposal, Northeastern proposed to acquire the entire 28.7-acre former military installation at East Point for use as a marine science campus that would "provide a year-round facility for research and instruction in the marine sciences and related fields." (J.A., Ex. 16, pp. 104-105). The April 1965 Proposal explained:

Despite its relatively small area, Nahant has an unusually diverse fauna and a wide variety of littoral¹⁰ habitats, ranging from rockbound cliffs and sandy beaches on the seaward side, to tidal mud flats on the landward side. **The University seeks to acquire the whole of East Point in order to make it a wildlife preserve.** Only in this way can the unusual littoral and benthonic¹¹ faunas be protected adequately. In addition, the University can assure that pollution will not jeopardize the continued high quality of the seawater for laboratory studies.

(J.A., Ex. 16, p. 106) (emphasis added). While Board of Selectmen chair Kelley opposed the federal government's transfer of the site to Northeastern, Conservation

¹⁰ "Littoral" refers to "the shore zone between high tide and low tide points." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/littoral> (accessed Sept. 15, 2022). The parties do not dispute the meaning of this term.

¹¹ "Benthonic" or "benthic" refers to "the bottom of a body of water." Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/benthic> (accessed Sept. 15, 2022). The parties do not dispute the meaning of this term.

Commission chair Alexander was supportive. (J.A., Ex. 17, p. 117, and Ex. 18). She advised the GSA that the Conservation Commission was "of the opinion that it is in the interest of the Town to have the property pass to an educational institution such as Northeastern University, particularly if there were reserved to the townspeople the right to walk along a pathway on the coastal edge of the upland and if some assurance is given that only low-lying or otherwise inconspicuous buildings are contemplated." (J.A., Ex. 18).

On May 17, 1965, Northeastern's then-president, Asa Knowles, wrote a letter ("May 1965 Letter") to a federal official advising that the Northeastern Board of Trustees had authorized Northeastern to take title to approximately 20 acres of the former military site at East Point, noting that Northeastern planned to use the property "for purposes of research in the area of marine biology and environmental engineering." (J.A., Ex. 19, p. 121). The May 1965 Letter went on to report that Knowles had recently met with Town officials and residents, who welcomed Northeastern to Nahant. (J.A., Ex. 19, p. 122). According to Knowles, at the meeting he and another Northeastern official "expressed our desire to co-operate in every way with the town officials" and "assured them we would work with the town in the development of a walkway through the property which could be used by citizens and others to view the ocean and the cliffs." (J.A., Ex. 19, p. 122).

In June 1965, the federal government approved Northeastern's application to acquire 20.4-acres of the former military site, reserving the remaining 8.3-acres for use by the Navy. (SOF, ¶ 42). Prior to the transfer of the property to Northeastern, the Conservation Commission attempted to negotiate from the federal government rights for

Town residents to use a two- or three-foot wide walking path to be created along the periphery of the property. (J.A., Exs. 21 and 22). In response, the federal government stated that it was agreeable to issuing a permit or license to the Town, but that it would be of only brief duration because a transfer of the property to Northeastern was imminent, and that a more practical approach for the Town would be post-transfer negotiations directly with Northeastern "with any resultant agreement being subject to approval by the Government." (J.A., Ex. 24). The Conservation Commission had, in fact, already reached out to Northeastern about a walking path prior to the transfer of the property. In a letter dated September 29, 1965 (the same date as its letter to the federal government seeking a path), the Conservation Commission forwarded Northeastern a draft agreement "concerning the right of the inhabitants of the Town to pass on the property" (J.A., Ex. 25). That agreement was never executed. (SOF, ¶ 46). Per the 1965 Annual Town Report:

The Commission was not able to secure from the Government and Northeastern University assurance that there would be an absolute right on the part of the townspeople to walk on a pathway around the cliffs. The Commission does, however, hope that some form of visiting privilege for scenic walks will be extended by Northeastern University.

(J.A., Ex. 15, p. 94).

Northeastern acquired the 20.4-acre property from the federal government on February 23, 1966. (J.A., Ex. 26). Among other things, the deed reserved to the federal government and its successors and assigns a perpetual 20-foot easement in, over, and across the Northeastern property to provide access to the 8.3-acre parcel the federal government was retaining – which area eventually became Lodge Park. (J.A., Ex. 26, p. 142). The deed also contained several restrictions, including a requirement that the

property "be utilized continuously in the manner and for the educational purposes set forth in the approved program and plan contained in the application of Northeastern University, dated June 16, 1965, and for no other purpose" for twenty years.¹² (J.A., Ex. 26, p. 145). The deed also barred Northeastern from selling, leasing, mortgaging, encumbering, or otherwise disposing of any part of or interest in the property without the written authorization of the Department of Health, Education, and Welfare for a period of twenty years. (J.A., Ex. 26, p. 145).

In the early 1970s, the federal government decided to dispose of the 8.3-acre site adjacent to the MSC Campus, and Northeastern and the Town each applied to obtain the site. (SOF, ¶ 52). On August 12, 1970, Northeastern's then-president Knowles provided the federal government with a document entitled, "The Development of Programs at Nahant," which set forth how Northeastern would further develop its property holding along with the additional land. (J.A., Ex. 32). In particular, the document explains: "If given control of both sites, Northeastern will request that the entire area be designated as a marine wild life [*sp.*] preserve." (J.A., Ex. 32, p. 173). The document goes on to describe proposed new facilities on both the 20.4-acre property already owned by Northeastern and the 8.3-acre site if transferred to Northeastern, including a "doubling of the size of the [e]xisting Edwards Laboratory." (J.A., Ex. 32, p. 176). Northeastern prepared an "Application for Purchase of Real Property for Educational Utilization," dated October 23, 1974, in connection with its efforts to obtain the 8.3-acre site. (J.A., Ex. 33). Under a section entitled, "Proof of Need," Northeastern stated:

¹² The parties reportedly have been unable to locate the June 16, 1965 application referenced in the deed.

Vital to the continued success of the studies at the [MSC] is the protection of the area and its preservation in the natural state. Although many visitors now come to the site, they are under the supervision of the Northeastern staff so that the ecology of the research areas is not disturbed. If the surplus property should be opened to the general public, it would be difficult to prevent trespass onto adjacent shoreline research projects, to prevent vandalism, to avoid defacing of the unique geological formation and general littering. Any use of this land incompatible with preserving the natural state of adjacent shorelines would be very detrimental to the existing program.

Should the [MSC] be unable to maintain the shoreline in its present natural state and to protect the research project from random human intrusions, then much of the value of the site would be lost

(J.A., Ex. 33, pp. 186-187).

The Town made formal application for the 8.3-acre site via a November 22, 1974, letter from then-chairman of its Board of Selectmen, Robert Steeves. (J.A., Ex. 34). In his letter, Steeves explained that the Town intended to use the site for the following public purposes: passive recreation; educational purposes; as a training site for the fire department and civil defense; and, preservation of open space. (J.A., Ex. 34, p. 209). Steeves also noted that, at that time, the Nahant school system was "using the area owned by Northeastern (with their permission) adjacent to the site for limited studies in ecological, marine biological and photography classes," and that East Point (including the area of the MSC Campus) "has been effectively closed to Nahanters" since the federal government acquired it in the 1940s. (J.A., Ex. 34, pp. 209-210).

The federal government ultimately decided to transfer the 8.3-acre site to the Town. After acquiring the 8.3-acre site, the Town petitioned the Land Court to amend the Town's and Northeastern's Registered Land Certificates of Title to reflect that the Town (not the military) was now the beneficiary of the 20-foot paved access easement

across the Northeastern property to the adjacent 8.3-acre site. (J.A., Ex. 36, and Deposition of Mark Cullinan, 90:3-13). The Town did not petition and has never petitioned the Land Court to seek to amend Northeastern's Certificate of Title to reflect any alleged easement by dedication. (Cullinan Depo., 90:14-17).

In 1995, Northeastern granted permission for a local astrophysicist, Peter Foukal, to construct a solar observatory on the land above Murphy Bunker. (SOF, ¶ 57; Cullinan Depo., 54:10-13). The Town was also consulted and concluded that the recreational use of observing the solar system complied with the way the area was zoned. (Cullinan Depo., 55:5-9). To construct the observatory, an area of land on top of the Murphy Bunker was cleared. (SOF, ¶ 58). Then a concrete pad foundation was laid and the observatory structure was installed. (SOF, ¶ 58). It operated on the land on top of Murphy Bunker from 1995 to 2018. (SOF, ¶ 59). The observatory was visible from Lodge Park and its existence on the land above Murphy Bunker was well-known to Town officials. (SOF, ¶ 60).

The observatory was used for scientific study and for educational programs. (SOF, ¶ 61). Northeastern asserts that the observatory was not freely open to or usable by the public. The NPT Parties dispute this, pointing to evidence that the observatory was advertised as being "open to Nahant residents for evening viewing of the Moon and planets, on most Friday evenings in the fall," and that Dr. Foukal would often accommodate private viewings on request. (SOF, ¶ 62, J.A., Exs. 74 and 81). The observatory was locked when not in use. (SOF, ¶ 63). No Town official or any other party objected to the clearing of land on top of Murphy Bunker or to the construction of

the observatory, nor did any party object to the observatory's operation on the land above Murphy Bunker. (SOF, ¶ 64).

Over the years, Northeastern's website describing the history of the MSC has stated the following: "The northeast portion of the property and the rocky coast are maintained as a wildlife sanctuary and ecological study area." (J.A., Ex. 86).¹³

The parties dispute the extent to which Northeastern sought to exclude the public from the MSC Campus over the past 50-plus years. Northeastern points to evidence that it hired a caretaker for the MSC whose job included maintenance and security at the property, "no trespassing" signs posted on the property, and internal memos noting the need to keep people not affiliated with the MSC off the property. The Nahant Plaintiffs, in turn, point to a multitude of affidavits and answers to interrogatories from Nahant residents attesting to their unfettered access to the area on top of and to the east of Murphy Bunker over the past many years. It is pointless to debate this conflicting evidence at the summary judgment stage. The Court construes the facts in the light most favorable to the Nahant Plaintiffs, as it must, and assumes for purposes of this motion that at least some Nahant residents have used the land on top of and to the east of Murphy Bunker for general recreation over the years, without seeking Northeastern's permission and under the impression that the area was open to the public.

¹³ One of the two printouts included in Exhibit 86 of the Joint Appendix shows that the webpage was last changed November 23, 1995. The other identifies a 2001-2002 copyright.

DISCUSSION

I. THE LEGAL FRAMEWORK

A. Summary Judgment Standard

The fact that the Land Court has determined in the Land Court action that the defendants in that action have a right to a jury trial on certain issues of fact does not preclude this Court from awarding summary judgment if the record reveals an absence of genuine issues of material fact.

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c). "The moving party has the burden of demonstrating affirmatively the absence of a genuine issue of material fact on every relevant issue, regardless of who would have the burden on that issue at trial." Arcidi v. NAGE, Inc., 447 Mass. 616, 619 (2006).

The party opposing summary judgment must respond and allege facts establishing the existence of a genuine issue of material fact for trial. Polaroid Corp. v. Rollins Envtl. Servs. (N.J.), Inc., 416 Mass. 684, 696 (1993). Moreover, "[i]n deciding a motion for summary judgment, the motion judge must consider all factual allegations, and draw all reasonable inferences therefrom, in favor of the nonmoving party." Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113, 119 (2010); see also Willits v. Roman Catholic Archbishop of Boston, 411 Mass. 202, 202 (1991) (any conflicts in the supporting materials are answered in favor of the non-movant). However, although the

Court views the evidence in the light most favorable to the non-moving party, it does not weigh evidence, assess credibility, or find facts. Drakopoulos v. United States Bank Nat'l Ass'n, 465 Mass. 775, 788 (2013) (citation omitted).

Finally, as is pertinent here, "a party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if [it] demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Jinks v. Credico (USA) LLC, 488 Mass. 691, 704 (2021) (citation omitted). "To be successful [in such a case], a moving party need not submit affirmative evidence to negate one or more elements of the other party's claim." Id. Moreover, "[a] nonmoving party's failure to establish an essential element of her claim 'renders all other facts immaterial' and mandates summary judgment in favor of the moving party." Roman v. Trustees of Tufts College, 461 Mass. 707, 711 (2012) (citations omitted).

B. Law Of Dedication Of Land

Article 97 of the Amendments to the Massachusetts Constitution provides, in pertinent part, that:

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and **the protection of the people in their right to the conservation**, development and utilization of the agricultural, mineral, forest, water, air and other natural resources **is hereby declared to be a public purpose.**

...

Lands and easements **taken or acquired for such purposes** shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote . . . of each branch of the [legislature].

Id. (emphasis added).

Although Article 97 became law in 1972, the SJC has “made clear that art. 97 applie[s] to all property that was taken or acquired for art. 97 purposes, including property taken or acquired before its ratification in 1972.” Smith v. Westfield, 478 Mass. 49, 62 (2017). Thus, Article 97 applies to property that had been protected, *inter alia*, under two common law doctrines: the prior public use doctrine and the public dedication doctrine. Id. at 58, 62. In fact, “the spirit of art. 97 is derived from” those common law doctrines, which should be applied under Article 97 to “inform [the court’s] analysis.” Mahajan v. Department of Env’tl. Protection, 464 Mass. 604, 616 (2013) (citation omitted).

“Under our common law [public dedication doctrine], land is dedicated to the public as a public park when the landowner’s intent to do so is clear and unequivocal, and when the public accepts such use by actually using the land as a public park.” Smith, 478 Mass. at 63 (citation omitted).¹⁴ Thus, a claim under the public dedication doctrine has two elements: (a) clear and unequivocal intent of the landowner to dedicate the land for public use; and, (b) acceptance by the public to use the land for the purpose so dedicated. Id. “The general public for whose benefit a use in the land was established by an owner obtains an interest in the land in the nature of an easement.” Lowell v. Boston, 322 Mass. 709, 730 (1948).

Clear and unequivocal intent may be demonstrated in a number of ways. “The recording of a deed or a conservation restriction is one way of manifesting such intent

¹⁴ Here, the parties agree that the common law public dedication doctrine informs this Court’s determination of whether the property at issue is protected by Article 97 and, thus, a two-thirds vote of the legislature is required for Northeastern to proceed with the Project.

but it is not the only way.” Id. “[T]he intent must be to use the land permanently as a public park,” not just “temporarily or until a better use has emerged or ripened.” Id.

Use of the land by the public “is competent, and often important, as bearing on the question of dedication, when that is in dispute; for if a man stands by, seeing the public use a way, permits it, and says nothing, it is very strong evidence to show an intention to dedicate.” Hayden v. Stone, 112 Mass. 346, 350 (1873). Dedication “also may be manifested by the owner’s acts from which such an intention can be inferred.” .” Attorney Gen. v. Onset Bay Grove Ass’n, 221 Mass. 342, 348 (1915).

In Smith, for example, where there was no recorded restriction, a dedication was found based on the 1979 “acceptance by the city of Federal conservation funds under the [Land and Water Conservation Fund Act of 1965] to rehabilitate the playground with the statutory proviso that, by doing so, the city surrendered all ability to convert the playground to a use other than public outdoor recreation without the approval of the Secretary [of the Interior].” Smith, 478 Mass. at 64.

C. Overview of Issues To Be Determined

As is relevant here, in their Complaint in the Superior Court action (No. 1977CV01211), the NPT Parties seek declarations that: (a) Northeastern “dedicated the land on top of and to the east of Murphy Bunker to the public for use as an Ecological Preserve and for passive recreation, and the public accepted that dedication, creating a public easement for that use that cannot be changed by [Northeastern]” (Verified Complaint, Count II, ¶ 86) (Paper No. 1); and, (b) “the public Ecological Preserve parkland on top of and to the east of Murphy Bunker is Article 97 land that cannot be transferred, altered or destroyed by [Northeastern] without compliance with the Article

97 transfer and/or change in use procedure" (Id., Count III, ¶ 95(1)).¹⁵ The Town seeks the identical declarations in the Complaint it filed in the Superior Court action.

(Complaint Of Intervenor-Plaintiff, Counts I and II) (Paper No: 45).

For its part, in its Complaint in the Land Court Action, Northeastern seeks declarations that: (a) it has not made a dedication of its property to the Town or the public; and, (b) its property is not subject to Article 97.¹⁶

In its Order Framing Questions Of Fact To Be Tried By Jury In The Superior Court Of Essex County ("Land Court Order"), the Land Court has identified the following questions of fact for trial by jury in this Court:

1. Did Northeastern University clearly and unequivocally intend to dedicate land on top of and to the east of Murphy Bunker in the Town of Nahant to the public for use as an ecological preserve and for passive recreation?
2. If the answer to Question 1 is yes, did Northeastern University clearly and unequivocally intend to permanently dedicate the above-described land to the public for such use?
3. If the answers to Questions 1 and 2 are both yes, did the public, generally, and/or the Town of Nahant on behalf of the public, accept Northeastern University's permanent dedication of the land on top of and to the east of Murphy Bunker in the Town of Nahant for use as an ecological preserve and for passive recreation?

(J.A., Ex. 88, p. 1034).

In the Motion, Northeastern seeks summary judgment on the Nahant Plaintiffs' claim that Northeastern dedicated the land on top of and to the east of Murphy Bunker to the public for use as an ecological preserve and for passive recreation through its

¹⁵ The NPT Parties also allege, *inter alia*, that the Project proposed by Northeastern violates Article 97 (Id., Count I).

¹⁶ In their answer in the Land Court action, the NHP Parties seek the opposite declarations.

public statements, actions, representations, use, and/or course of conduct of the past 50-plus years.

The Nahant Plaintiffs argue that summary judgment should be denied because there are genuine issues of material fact regarding Northeastern's intent to dedicate that land. The Nahant Plaintiffs point to Northeastern's and the public's 50-year course of conduct, coupled with statements, assurances, and representations made by Northeastern when it acquired the property and in the decades since, as creating a triable issue on the question of Northeastern's intent to dedicate.

For the following reasons, the Court concludes that the Nahant Plaintiffs have no reasonable expectation of establishing that: (a) Northeastern clearly and unequivocally intended to permanently dedicate the property on top of and to the east of Murphy Bunker for use as an ecological preserve and for passive recreation; and, (b) there was an acceptance of the purported dedication by the general public.

The Court also concludes, as a matter of law, that even if the property was acquired by Northeastern for educational use, and as an ecological preserve and for passive recreation, as the Nahant Parties contend, Article 97 and the prior public use doctrine do not apply because the property was not "devoted to one public use," as required under Mahajan, 464 Mass. at 617, and the cases cited therein. As a result, summary judgment in Northeastern's favor is appropriate.

III. THE NAHANT PLAINTIFFS HAVE NO REASONABLE EXPECTATION OF PROVING NORTHEASTERN MANIFESTED A CLEAR AND UNEQUIVOCAL INTENT TO DEDICATE THE PROPERTY FOR PUBLIC USE

A. There Is No Record Evidence That Demonstrates A Clear And Unequivocal Intent By Northeastern To Dedicate The Property For Public Use At The Time Of Acquisition In 1966

In support of their argument that Northeastern intended to dedicate the land on top of and to the east of Murphy Bunker to the public for use as an ecological preserve and for passive recreation, the Nahant Plaintiffs rely heavily on Northeastern's April 1965 Proposal and the May 1965 Letter. In particular, they point to the April 1965 Proposal's statement that "[t]he University seeks to acquire the whole of East Point in order to make it a wildlife preserve" and the May 1965 Letter's statement that Northeastern had assured town officials that they "would work with the town in the development of a walkway through the property which could be used by citizens and others to view the oceans and the cliffs." The significance the Nahant Plaintiffs seek to impart on these words, however, ignores the context in which they were written, as well as the larger historical context of the negotiations regarding the federal government's disposition of East Point.

When the property that ultimately became the MSC Campus first became available in the early 1960s, the Town turned down the chance to purchase it for the purpose of a public park, apparently in part because of concerns that the Town would have been required to open and maintain it for use by the public at large, i.e., not just Nahant residents. (J.A., Ex. 13, pp. 65, 71; Ex. 14, pp. 87-88). Thereafter, the Town sought to facilitate a transfer that would secure for townspeople the right to walk along a scenic pathway along the shoreline of the property. (J.A., Ex. 14, pp. 87-88). It was in

this context that Northeastern came onto the scene and developed its proposal to use the property for a marine science research facility.

The April 1965 Proposal on which the Nahant Plaintiffs rely is focused on Northeastern's plan to use the property as a year-round facility for marine science research and education. Its statement that "[t]he University seeks to acquire the whole of East Point in order to make it a wildlife preserve," is made in the context of describing the area's unique littoral habitats, and what its authors viewed as the only way to adequately protect the area's unusual littoral and benthonic faunas, and a way to assure that pollution would not jeopardize the quality of the seawater needed for laboratory studies. The use of the term "wildlife preserve" in and of itself does not imply public access, particularly in this context. It is also important to note that, in April 1965, the dry land on East Point was relatively barren thanks to years of military use. (SOF, ¶ 37). All of these facts lead to the conclusion that the April 1965 Proposal's statement that "[t]he University seeks to acquire the whole of East Point in order to make it a wildlife preserve" was aimed at protecting what it called the "unusual littoral and benthonic faunas" in the area, not the then-barren land on top of and to the east of Murphy Bunker.¹⁷

Additionally, in the very next paragraph following the "wildlife preserve" passage of the April 1965 Proposal, the authors contemplate building on portions of the land (a pumphouse, saltwater storage tank, and living quarters), which, according to the Nahant Plaintiffs, Northeastern had just stated it intended to designate as a wildlife preserve.

¹⁷ It also bears noting that there is no evidence that in 1965 - 1966, the Town asked Northeastern to make the whole area of East Point a wildlife preserve accessible to the public; rather, the Town only sought the right to a scenic walking pathway on the property.

Later, the April 1965 Proposal notes that Northeastern "seeks to utilize the Nahant site to its fullest potential" and that "activities other than those just mentioned would be permitted, provided that they did not interfere with the scientific studies of the proposed Institute." (J.A., Ex. 16, p. 113). The April 1965 Proposal elaborates that the site could be used by Northeastern's Underwater Society as a scuba diving training and exploration area, and possibly by other Northeastern organizations for life saving, sailing, sketching and painting instruction. (J.A., Ex. 16, pp. 113-114). It makes no mention of the possible establishment of a scenic path for recreational use by Nahant residents or the public generally.

The May 1965 Letter's statement that Northeastern had assured Town officials that they "would work with the town in the development of a walkway through the property which could be used by citizens and others to view the oceans and the cliffs," brings the Nahant Plaintiffs no closer to a dedication for public use. Ambiguous assurances that Northeastern would work with the Town to develop a scenic walkway cannot constitute a clear and unambiguous intent to dedicate the entire area of land on top of and to the east of Murphy Bunker.

Several other facts support the conclusion that Northeastern neither had, nor expressed, a clear and unequivocal intent to dedicate the land on top of and to the east of Murphy Bunker. It is undisputed that, at the time of the federal government's approval of Northeastern's application to acquire the 20.4-acres of land (i.e., the MSC campus) in June 1965, the Town was seeking to negotiate the right for Town residents to use a two- or three-foot wide walking path along the periphery of the property.¹⁸ The federal

¹⁸ This is consistent with the 1964 Annual Town Report, which notes the Conservation Commission's desire to acquire "the right to walk along a scenic pathway which would follow as

government deferred, suggesting that the Town negotiate directly with Northeastern post-transfer, "with any resultant agreement being subject to approval by the Government." (J.A., Ex. 24). In its pre-transfer communications with Northeastern, the Town proposed a draft agreement "concerning the right of the inhabitants of the Town to pass on the property," but it was never executed. The 1965 Annual Town Report confirms that the Town "was not able to secure from the Government and Northeastern University assurance that there would be an absolute right on the part of the townspeople to walk on a pathway around the cliffs" and expresses the "hope that some form of visiting privilege for scenic walks will be extended by Northeastern University." (J.A., Ex. 15, p. 94). None of the communications between the Town, the federal government, and Northeastern following the April 1965 proposal and leading up to the February 1966 transfer of the property to Northeastern make any mention of the "wildlife preserve" designation referenced in the April 1965 Proposal as being a way of granting Town residents access to the property.

In addition, since a dedication results in an easement, see Lowell, 322 Mass. at 730, a dedication by Northeastern in 1966 (and the succeeding twenty years) would have required the approval of the federal government. (J.A., Ex. 26, p. 145). The deed by which Northeastern acquired the property in 1966 makes no mention of any dedication of any portion of the land for a path or other passive recreation by Town residents and, consistent with the federal government's earlier representation that any

much of the shoreline as is included in this property," (J.A., Ex. 14, pp. 87-88), and Knowles' May 1965 Letter noting Northeastern's assurances to Town officials and residents that Northeastern would "work with the town in the development of a walkway through the property which could be used by citizens and others to view the ocean and the cliffs." (J.A., Ex. 19, p. 122).

agreement granting the Town a path along the MSC Campus would be subject to government approval, the deed includes a provision barring Northeastern from encumbering or otherwise disposing of any part of or interest in the property without the written authorization of the federal government for twenty years. (J.A., Ex. 26). There is no record evidence that Northeastern ever sought government approval for any type of dedication like that now argued by the Nahant Plaintiffs.

Also contradicting Northeastern's intent to dedicate is the Nahant Plaintiffs' vague description of the purportedly dedicated land. The Nahant Plaintiffs claim that Northeastern has dedicated the land "on top of and to the east of Murphy Bunker." Even after years of litigation and the development of a voluminous summary judgment record, the exact bounds of the allegedly dedicated land are undetermined. In a case where the Nahant Plaintiffs seek a declaration that Northeastern in effect relinquished some of the sticks from its bundle of property rights, the lack of more precisely defined boundaries is telling.

For all these reasons, the Nahant Plaintiffs have no reasonable expectation of proving that Northeastern clearly and unequivocally intended to dedicate the land on top of and to the east of Murphy Bunker (or, for that matter, any of its land on East Point) as an ecological preserve and for passive recreation at the time Northeastern acquired the property that became the MSC Campus in 1966.

B. The Record Evidence Of The Treatment And Use Of The Property And Statements Made By Northeastern In The Years Since It Acquired The Property In 1966 Does Not Evidence An Intent To Dedicate The Property For Public Use

The Nahant Plaintiffs' dedication claim is not based solely on the April 1965 Proposal and May 1965 Letter in isolation. Rather, the Nahant Plaintiffs contend that "[e]vidence of [Northeastern's] clear unequivocal intent to dedicate the wildlife sanctuary for public use is found in those two documents and its oral assurances and in its maintenance of the wildlife preserve and the more than 50-year open use and access by the public and in decades of cooperation with the Town to conserve the wildlife preserve as protected public open space." (NPT Parties' Opp'n, p. 4) (emphasis in original).

In particular, the Nahant Plaintiffs point to the following: statements made by Northeastern in connection with its efforts to obtain the remaining 8.3-acre site on East Point in the 1970s; statements on Northeastern's website describing the area as "being maintained as a wildlife sanctuary and ecological study area" (J.A., Ex. 86); the operation of a solar observatory on the property from 1995 to 2018; and testimony and affidavits from numerous Nahant residents attesting to their unfettered use of the MSC Campus over the past 50-plus years.

Northeastern's statements in connection with its efforts to obtain the remaining 8.3-acre site on East Point in the 1970s do not evidence an intent to dedicate. While the "Development of Programs at Nahant" document did note that Northeastern would "request that the entire area be designated as a marine wild life [*sp.*] preserve" if given control of the remaining site, that same document also described plans for significant

development of the area in connection with expanding the MSC. (J.A., Ex. 32, pp. 173, 176).

As noted above, the use of the term "wild life [sp.] preserve," in and of itself, does not imply public access, particularly when viewed in conjunction with the "Application for Purchase of Real Property for Educational Utilization" Northeastern submitted in 1974 in connection with its efforts to obtain the 8.3-acre site. There, Northeastern explained:

Vital to the continued success of the studies at the [MSC] is the protection of the area and its preservation in the natural state. Although many visitors now come to the site, they are under the supervision of the Northeastern staff so that the ecology of the research areas is not disturbed. If the surplus property should be opened to the general public, it would be difficult to prevent trespass onto adjacent shoreline research projects, to prevent vandalism, to avoid defacing of the unique geological formation and general littering. Any use of this land incompatible with preserving the natural state of adjacent shorelines would be very detrimental to the existing program.

Should the [MSC] be unable to maintain the shoreline in its present natural state and to protect the research project from random human intrusions, then much of the value of the site would be lost

(J.A., Ex. 33, pp. 186-187). In the face of this language, it is impossible to sustain the Nahant Plaintiffs' argument that Northeastern demonstrated a clear and unequivocal intent to dedicate the land on top of and to the east of Murphy Bunker, a significant portion of its property at East Point, to public access for even "passive" recreational purposes.

With respect to the operation of a solar observatory on top of Murphy Bunker from 1995 to 2018, that use also does not evidence a clear and unequivocal intent to dedicate the land on top of and to the east of Murphy Bunker to the public for use as an ecological preserve and for passive recreation. It is undisputed that Dr. Foukal built the

observatory with Northeastern's permission, that it was locked when not in use, and that the public only had access to it when Dr. Foukal (Northeastern's invitee) was present. (SOF, ¶¶ 57, 62, 63). In addition, the Nahant Plaintiffs' argument that the observatory is evidence of an intent to dedicate the area to public use contradicts their argument that the use of the term "wildlife preserve" in the April 1965 Proposal evidenced an intent to dedicate the then-barren land on top of and to the east of Murphy Bunker. The clearing of land on top of the bunker, pouring of a concrete pad, and construction of the observatory structure is inconsistent with an intent to dedicate that area as a "wildlife preserve." There is no evidence that any of the Nahant Plaintiffs, or anyone else, ever objected to the observatory's construction and operation on grounds that it disturbed the area they now claim was dedicated as a "wildlife preserve" in the 1960s.

**IV. THE NAHANT PLAINTIFFS HAVE NO REASONABLE
EXPECTATION OF PROVING THE PUBLIC ACCEPTED
NORTHEASTERN'S PURPORTED DEDICATION OF THE PROPERTY
FOR PUBLIC USE**

The Court next turns to the Nahant Plaintiffs' evidence of the public's recreational use of the property at issue over the past 50-plus years; i.e., the second element of the aforementioned Smith paradigm.

As noted above, the Court assumes for purposes of this motion that Nahant residents have used the land on top of and to the east of Murphy Bunker for general recreation over the years, without seeking Northeastern's permission and under the impression that the area was open to the public. The summary judgment record is replete with evidence (in the form of, among other things, affidavits and answers to interrogatories) that **Nahant residents** have used portions of the MSC Campus, in particular the land on top of and to the east of Murphy Bunker, for passive recreation for

decades. The Nahant Plaintiffs point to this as evidence of both Northeastern's intent to dedicate (in that Northeastern allowed the conduct to continue for many years) and the public's acceptance of the dedication.

At first blush, this argument may seem persuasive. However, the summary judgment record lacks any evidence that the **general public**, that is, people other than Nahant residents, have used the land in question for passive recreational purposes.

For land to constitute dedicated land, it must be dedicated to and accepted by the general public, i.e., the inhabitants of the Commonwealth and public at large, not just the residents of the particular municipality where the land sits. The Supreme Judicial Court answered the question of who constitutes the "general public" in detail in Smith, stating:

The "general public" that has obtained an "interest in the land in the nature of an easement," [Lowell, 322 Mass.] at 730, is not simply the residents of the particular city or town that owns the parkland. See Higginson v. Treasurer and Sch. House Comm'rs of Boston, 212 Mass. 583, 589 (1912). This court in Higginson declared:

"[T]he dominant aim in the establishment of public parks appears to be the common good of mankind rather than the special gain or private benefit of a particular city or town. The healthful and civilizing influence of parks in and near congested areas of population is of more than local interest and becomes a concern of the State under modern conditions. It relates not only to public health in its narrow sense, but to broader considerations of exercise, refreshment and enjoyment."

Id. at 590.

Because the general public has an interest in parkland owned by a city or town, ultimate authority over a public park rests with the Legislature, not with the municipality. See Lowell, 322 Mass. at 730. "The rights of the public in such an easement are subject to the paramount authority of the General Court which may limit, suspend

or terminate the easement." Id. As stated in Lowell, 322 Mass. at 730, quoting Wright v. Walcott, 238 Mass. 432, 435 (1921):

"Land acquired by a city or town by eminent domain or through expenditure of public funds, held strictly for public uses as a park and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court ... The power of the General Court in this regard is supreme over that of the city or town."

Smith, 478 Mass. at 60. This is in accordance with Article 97, which places in the hands of the Legislature (the representatives of the people of the Commonwealth) the power to dispose of or change the use of dedicated land by a two-thirds vote.

Thus, even if Northeastern had a clear and unequivocal intent to dedicate the land in question pursuant to Article 97, the holder of the easement would be the general public, not the residents of Nahant. In the absence of any record evidence that the general public accepted the purported dedication of the land on top of and to the east of Murphy Bunker for use as an ecological preserve and for passive recreation, the Nahant Plaintiffs' dedication claim fails as a matter of law.

V. THE NAHANT PLAINTIFFS' CLAIM OF DEDICATION OF LAND FOR PUBLIC USE FAILS AS A MATTER OF LAW BECAUSE ARTICLE 97 AND THE PRIOR PUBLIC USE DOCTRINE DO NOT APPLY WHERE LAND IS NOT DEVOTED TO ONE PUBLIC USE

While not argued in the parties' memoranda, summary judgment in favor of Northeastern is appropriate for the additional reason that, even assuming (in the light most favorable to the Town) that the property was acquired by Northeastern for educational use, and as an ecological preserve and for passive recreation, the prior public use doctrine is not applicable because it "is only applicable to those lands which are . . . devoted to one public use." Mahajan, 464 Mass. at 617 (quotations and citations omitted) (emphasis in original) (where wharf was taken for range of urban

renewal purposes, some of which were consistent with Article 97 purposes, property was not subject to Article 97); see also Robbins v. Department of Pub. Works, 355 Mass. 328, 330 (1969) (land taken by eminent domain for "park purposes" cannot be used to build "public highway" without vote of Legislature); Muir v. Leominster, 2 Mass. App. Ct. 587, 591-592 (1974) (prior public use doctrine inapplicable where property was acquired by city via unrestricted deed and not formally dedicated as park land, but was used for thirty years as playground and for other recreational purposes).

For land to be subject to Article 97, it must be " **'taken or acquired for [the] purpose'** of protecting interests covered by art. 97." Mahajan, 464 Mass. at 616 (emphasis in original). The prior public use doctrine, from which "the spirit of art. 97 is derived," "holds that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion, . . . is only applicable to those lands which are in fact **devoted to one public use.**" Id. at 616-617. (internal citations and quotations omitted) (emphasis in original).

"Even where land was taken for purposes included within the protection of art. 97, where those purposes were not the overarching purpose of the acquisition, or were only incidental to a non-art. 97 use for which the land was also taken or dedicated, or where the land was taken for more than one use, including a use or uses not protected by art. 97, then the requirements of art. 97 for a vote of the Legislature to approve a change in use will not apply." Mirkovic v. Guercio, No. 16 MISC 000054 (HPS), 2017 WL 4681972, at *3 (Mass. Land Ct. Oct. 18, 2017). Thus, by extension, here, where one use is covered by Article 97 (ecological preserve and passive recreation) and the other use (educational) is not, Article 97 cannot be invoked as a matter of law.

ORDER

For the above reasons:

1. In Superior Court Case No. 1977CV01211:

a. It is HEREBY ORDERED that Northeastern University's Motion For Summary Judgment On The Dedication Claim (Paper No. 72) is ALLOWED.

b. It is HEREBY DECLARED and ADJUDGED that:

(i) Northeastern University has not dedicated, and the public has not accepted, the land on top of and to the east of Murphy Bunker at East Point, Nahant, MA, to the public for use as an ecological preserve and for passive recreation;

(ii) a public easement on said land has not been created; and,

(iii) said land is not subject to Article 97 of the Amendments to the Massachusetts Constitution.

c. Count II, so much of Count III that seeks a declaration that said land is subject to Article 97 and the EOEEA's Article 97 Land Disposition Policy, Count IV, and Count V of the NHP Parties' Verified Complaint (Paper No. 1) are HEREBY DISMISSED.

d. Count I, so much of Count II that seeks a declaration that said land is subject to Article 97 and the EOEEA's Article 97 Land Disposition Policy, Count III, and Count IV of the Town of Nahant's Complaint (Paper No. 45) are HEREBY DISMISSED.

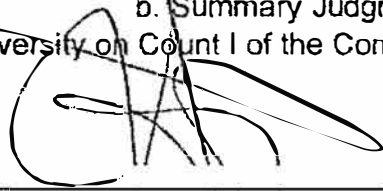
2. In Land Court Case No. 19MISC00390:

a. It is HEREBY DECLARED and ADJUDGED that:

(i) Northeastern University has not dedicated, and the public has not accepted, the land on top of and to the east of Murphy Bunker at East Point, Nahant, MA, to the public for use as an ecological preserve and for passive recreation; and,

(ii) said land is not subject to Article 97 of the Amendments to the Massachusetts Constitution.

b. Summary Judgment SHALL ENTER on behalf of Northeastern University on Count I of the Complaint (Paper No. 1).



Jeffrey T. Karp
Associate Justice, Superior Court
Dated: September 20, 2022

SUPERIOR COURT DEPARTMENT OF THE
TRIAL COURT

NAHANT PRESERVATION TRUST, INC.,
et al.

Plaintiffs,

V.

NORTHEASTERN UNIVERSITY,

Defendant.

Civil Action No. 1977-cv-01211A

NORTHEASTERN UNIVERSITY,

Plaintiff,

V.

NAHANT PRESERVATION TRUST,
INC., et al.

Defendants.

CONSOLIDATED WITH:
LAND COURT DEPARTMENT OF
THE TRIAL COURT
CASE NO. 19 MISC 000390/Sup.
Ct. Civil Action No. 1977-cv-00186

**NAHANT PRESERVATION TRUST PLAINTIFFS’¹ OPPOSITION
TO NORTHEASTERN UNIVERSITY’S MOTION FOR
SUMMARY JUDGMENT ON THE DEDICATION CLAIM**

1 The Nahant Preservation Trust Inc. Plaintiffs are defined herein as Nahant Preservation Trust Inc., Christian Bauta, Tess Bauta, Elizabeth K. Berman, Anne Bromer, Candace Cahill, Michelle Capano, Alice Cort, Carl Jenkins, Marilyn Mahoney, William Mahoney, Dan McMackin, Diane Monteith, Andrea Murphy, Jeffrey Musman, Patrick O'Reily, Marie Elizabeth Pasinski, M.D., Roger Pasinski, M.D., Vi Patek, Linda Pivacek, Emily Potts, Laura Poulin, Peter Rogal, Peggy Silva, Susan Solomon, Paul Spirn, Donna Steinberg and Jim Walsh (collectively, the "NPT Plaintiffs" or "NPT").

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INTRODUCTION

The question at the heart of this case is whether the wildlife preserve that Northeastern University (“NEU”) admittedly created and has maintained for nearly 60 years was intended by NEU to be dedicated for public use. NEU’s written promises, oral assurances and public representations spanning the past half-century, together with NEU’s and the public’s course of conduct over that time, answer that question in the affirmative. Summary judgment should be denied because there are genuine issues of material fact regarding NEU’s intent to dedicate some 12 acres of the northeast portion of its site at East Point in Nahant, long-identified publicly by NEU as a “wildlife preserve” or a “wildlife sanctuary”, for public use. For more than two generations, NEU has opened the wildlife preserve to unfettered public access for passive recreation and wildlife observation, including walking, hiking, cliff fishing, birdwatching, stargazing at a public observatory, historical and cultural study, special events, artistic endeavors, and free play by the Town’s children, just as it promised it would in 1965. For decades, NEU has coordinated and cooperated with the Town of Nahant to preserve the wildlife sanctuary through open space planning, integration with the contiguous, Town-owned Lodge Park and through zoning as a protected Natural Resource District. It is, by every measure, a public park.

NEU’s recent and sudden about-face, led by a new expansionist administration vying to construct a 55,000 square foot facility in place of the wildlife preserve – in order to appropriate the magnificent scenic views for itself – and NEU’s attempt to renege on its 50-plus-year public dedication have caused this dispute. Now, after the close of discovery, material questions of NEU’s dedicatory intent and of its credibility must be resolved by a jury. NPT Plaintiffs hereby oppose NEU’s Motion for Summary Judgment on the Dedication Claim (the “Motion”).¹

¹ In its Motion, NEU does not identify the count(s) on which it has moved for summary judgment. NPT Plaintiffs understand that NEU’s Motion is as to Count I of its Land Court Complaint and Count II of NPT Plaintiffs’ Verified

NPT has submitted sufficient evidence, together with inferences that must be drawn in its favor, to require resolution of this issue by jury, as framed by the Land Court and as it is entitled to under the Massachusetts Constitution. At the outset, some salient facts are self-evident and not disputed in good faith: (1) NEU has created and maintained for 55 years the northeast portion of its site as a “wildlife preserve” or “wildlife sanctuary”, causing that portion to develop into a mature forest on top of Murphy Battery and a biodiverse, “thriving meadow” east to the cliff-lined shore; (2) the public has made uninterrupted and unfettered use of this wildlife preserve for passive recreation, and the enjoyment of wildlife and scenic beauty, including as a unique location for migratory bird watching, for more than fifty years; and (3) the Town and the public relied on NEU’s commitment to maintain the wildlife preserve when the Town acquired, renovated and dedicated Lodge Park, the adjacent and contiguous 8-acre public park, and when the Town designated the entire East Point peninsula, including Lodge Park and the wildlife preserve, as a Natural Resource District and treated the area as protected open space in its municipal planning for more than thirty years, all with NEU’s active cooperation.²

What remains hotly in dispute is whether NEU’s and the public’s 50-year course of conduct, coupled with statements, assurances and representations made by NEU when it acquired the property, and in the decades since, creates a triable issue on the question of NEU’s intent to dedicate. To secure the Town’s support – which was essential to the federal government’s award of the property to NEU in 1965 – NEU gave oral and written assurances to the Town and its residents, and particularly the Conservation Commission, that the Town’s citizens would have

Complaint and oppose the Motion accordingly. Regardless, the burden is on NEU as the moving party to show that there are no issues of material fact in dispute and all inferences are afforded to NPT Plaintiffs as the responding party.

² As shown below, NEU’s attempts to create factual issues regarding public access and use, NEU’s encouragement of same, and the Town’s municipal planning are weak, and the evidence is essentially uncontroverted on these issues. NEU does not argue or dispute public acceptance in the Motion.

access to the site to enjoy the magnificent views of the cliffs and the ocean and for passive recreation as they had prior to the military's occupation of the property.

NEU's public statements since have been entirely consistent with the intention and conduct of a public dedication, including among others: the averment appearing on NEU's website for at least a decade that "that the northeast portion of the property...[has been] maintained as a wildlife sanctuary"; and the identical characterization approved by Joseph Ayers, longtime NEU Marine Science Center ("MSC") Executive Director, made twice in Nahant's Conservation Commission's 1989 Request for Proposals ("RFP") for the renovation of Lodge Park: "The northeast portion of the property and the rocky coast are maintained as a wildlife sanctuary and ecological study area. . . . The elevated [Lodge Park] site provides excellent viewing areas of the wildlife sanctuary maintained by Northeastern".

NEU seeks to limit this Court's review primarily to the four-corners of two documents from 1965, devoid of their critical context and dismissive of NEU's and the public's subsequent 50-plus-year conduct. However, under the leading public dedication case, Smith v. City of Westfield, 478 Mass. 49 (2017), the 50-plus years of NEU's preservation and the public's access and use is, alone, sufficient to complete NEU's public dedication. With the written and oral statements and assurances, there is more than sufficient evidence to establish triable issues of fact as to whether the wildlife sanctuary created and maintained by NEU was and remains intended for public use, access, and enjoyment, and cannot now be revoked. NEU tries to recast its past statements and past conduct, by turns, as intended to create a "temporary" sanctuary – only until NEU no longer has a use for it; or as a "private" sanctuary for NEU's use alone; or as a sanctuary whose sole purpose – although actually preserving the woods and meadow – is intended to protect only the coastline; or even denying the very existence of the wildlife

sanctuary or incredulously claiming that the wildlife sanctuary is just the product of neglect. These flailing reinterpretations are not only illogical but are also irreconcilable with the actual history and evidence. At the very least, a genuine issue of material fact precluding summary judgment is posed on the issue of NEU's intentions regarding the wildlife sanctuary.

NEU fails to understand or consider the bedrock principle of Smith – that the 300-plus year-old common law of public dedication remains in full force and effect, not limited to or restricted by Article 97 and under the public dedication common law, there need be no writing or incantation of any magic words to establish NEU's intent to forever dedicate the wildlife preserve for public use.

Rather, in a historic case such as this, the best evidence of NEU's intent is its and the public's course of conduct over the last half century – how has the property actually been used? To begin and end the analysis with two 1965 documents and never consider their context, the historic public use and subsequent statements would be an error of law. Evidence of NEU's clear, unequivocal intent to dedicate the wildlife sanctuary for public use is found in those two documents and its oral assurances and in its maintenance of the wildlife preserve and the more than 50-year open use and access by the public and in decades of cooperation with the Town to conserve the wildlife preserve as protected public open space.

NPT Plaintiffs have submitted twenty-two responses to interrogatories as well as additional affidavits from Nahant residents and officials, affirmed under the pains and penalties of perjury, that set forth decades of public use of the wildlife sanctuary including a variety of passive recreation activities. NEU, in contradiction to its past statements and actions, merely offers self-serving, inconsistent, revisionist and non-credible deposition testimony and affidavits, gaslighting the Town's residents. NEU claims that the residents are lying, and that the public has

never used the wildlife preserve. Alternatively, NEU claims that it is wholly unaware of the public's use of the wildlife preserve and that the entire Town was trespassing undetected for over 50 years.

If nothing else, this creates a fundamental question of competing credibility between NEU and the residents of Nahant, requiring denial of summary judgment for a jury to resolve. The Land Court was prescient in framing the three questions of dedication for the jury over two years ago and, with the close of discovery, it is time for this dispute to proceed to jury trial.

FACTUAL BACKGROUND³

Material facts that NEU omitted from or discounted in its Statement of Facts, but which are critically necessary to understand the key issues that remain in dispute are set forth below. Due to the sheer volume of evidence of the public and historic use of this site, dating back over well over 60 years, collected from multiple federal, state and local archives and from over 25 residents of Nahant through interrogatory responses and affidavits, some facts are reserved for the Argument Section below.

1. The End of the U.S. Military Use of East Point and the Town's Preservation Efforts.

Prior to the U.S. military occupation of East Point as a defense site during World War II, the Lodge and Elliot estates that owned the peninsula were open to the residents of Nahant to use and enjoy the unparalleled, undeveloped scenic wonder that is East Point. Ex. 5, p. 40; Ex. 8, p. 7; Ex. 44, p. 285; Tarmy Aff., Ex. A, p. 7; Sears Aff. ¶ 3. The interior remained in its natural state. Tarmy Aff., Ex. B; Spencer Aff., Ex. 1. The public was free to walk the Circumferential Path, a cliffside path, that traced the perimeter of the headland to view the ocean and cliffs.

³ NPT Plaintiffs rely on the Verified Complaint, the Response to NEU's Statement of Facts and Additional Facts set forth herein; the NPT Plaintiffs' Responses to Interrogatories, the affidavits of Calantha Sears, Lynne Spencer, Julie Tarmy, Linda Pivacek and Christian Bauta and the depositions of Mark Cullinan, Geoffrey Trussell and Joseph Ayers, each attached to the Appendix of Affidavits and Documents and cited herein as "[Last Name] Aff., ¶ __" and "[Last name] Depo. at [page]", respectively.

Sears Aff. ¶ 3; Ex. 44, p. 675. The military occupation of East Point, from 1941 to the 1960s strictly prohibited public entry. Ex. 75, p. 941.

In 1963, the military no longer needed the site and it went to the Government Services Administration (“GSA”) for disposal, except for the 8.3 acre Nike missile site that was retained by the Navy for another 10 years. Under the GSA surplus property disposal regulations, the Town had the priority to purchase the property. On July 2, 1963, the Town formally applied to the GSA to acquire the 20 acres, noting that it sought the property for the “natural beauty of the setting for a ‘cliff or nature walk’”. Ex. 43, p. 669. The GSA, which was charged with considering the public benefit of any surplus property disposal, credited the “definite need for additional recreation or park land of the type that is planned. . . this tract is especially well suited and ideally located for the park and recreation use planned.” Ex. 87, p. 1027. The GSA approved the Town’s application for purchase, pending the appropriation of funds at Town Meeting. Ex. 11. The Town, however, would have had to purchase the property and expend additional funds to clean up and secure the military aftermath. Ex. 13, p. 72.

The Board of Selectmen had preferred that the property be subdivided and developed as residential parcels to generate tax revenue, whereas, the Conservation Commission, chaired by Ruth Alexander, wanted to preserve the unparalleled beauty and restore public access to the historic Circumferential Path and East Point’s scenic wonder. At the 1964 Annual Town Meeting, the Town debated East Point’s fate. In the 1964 Annual Town Report, the Conservation Commission noted that it is “desirable to acquire for the town people, if possible without expenditure of money, the right to walk along a scenic pathway which would follow the shoreline and is included in this property.” Ex. 14, pp. 87-88 (emphasis added).

While the Town ultimately deferred action in 1964 on a vote to appropriate funds to acquire the property (Ex. 13, p. 111), Alexander maintained her effort to preserve the property and restore the public access, asking that a committee of volunteers be formed “to keep this and have it a beauty spot and have our walk around the rocks continued as it used to be” and envisioning its future, “this place arranged with trees. . . it could be something that we could be awfully proud of, awfully useful to us, better for all of our children. . . to have a place that they can go and a small woods like this would to them be a great forest.” Ex. 13, pp. 66-67.

By the next Annual Town Meeting, in the spring of 1965, the Conservation Commission reported that NEU president Asa Knowles had visited the East Point site with two members of the Conservation Commission. Ex. 44, p. 676. The Town unanimously approved the formation of an advisory committee, headed by Alexander to figure out a way preserve East Point and restore public access. Ex. 15, pp. 98-99. At that time, NEU was interested in the site but had not yet applied to the GSA or obtained approval from its Board of Trustees. Ex. 44, p. 676. The Conservation Commission noted of NEU that “lately they would be willing to grant us a revocable license for the Town . . . to go along and have a pathway along the edges of the cliff.” Id. To this, there was a rousing applause from the Town Meeting and a unanimous vote to authorize the Conservation Commission to negotiate and acquire on behalf of the Town rights to access and use the Circumferential Path and scenic views. Id.

2. NEU’s Assurances to the Town to Preserve East Point and Restore Public Access.

On April 30, 1965, the Conservation Commission continued its discussions with the GSA, writing that “after prolonged consideration to what use of the property would be most desirable in the interests of the inhabitants of the Town[,] [i]n so far as conservation aspects are concerned (namely, preservation of the unusual beauty of this striking bit of unspoiled cliff-lined

coastline) we are of the opinion that it is in the interest of the Town to have the property pass to an educational institution such as Northeastern University, particularly if there were reserved to the townspeople the right to walk along a pathway of the coastal edge of the upland and if some assurance is given that only low-lying or otherwise inconspicuous buildings are contemplated.”

Ex. 18, p. 119 (parenthetical in original; emphasis added).

The GSA responded four days later, May 4, 1965, with two letters – one to the Nahant Board of Selectmen and one to the Conservation Commission. To the Selectmen, the GSA made clear that the Town still retained its ability to acquire the property if it submitted a new application. Ex. 45. The GSA reminded the Selectmen that in considering disposal of the property, “it is the responsibility of [the GSA] to carefully weigh the benefits derived by the general public from such use against those to be derived from a return of property to local tax rolls” and that “if Northeastern University decided to apply for the subject property, all factors relating to the proposed transfer will be similarly weighed.” *Id.* The GSA specially credited that the Conservation Commission was now a proponent of NEU’s acquisition. *Id.*

On May 14, 1965, just 10 days following the GSA letters, NEU President Knowles met with the Nahant Board of Selectmen, the Planning Board, the Advisory Committee and several citizens to proudly inform them that the NEU Board of Trustees had authorized acquisition of the East Point property. Ex. 19, p. 121. There were several speeches as to the advantage the Town would derive from having NEU take stewardship of the property. *Id.*, p. 122. NEU’s president expressed NEU’s “desire to co-operate in every way with the town officials” and “[w]e further assured them [town residents and officials] we would work with the town in the development of a walkway through the property which could be used by the citizens and others to view the ocean and the cliffs . . . this way the town would still have the benefit of the beauty of the area”. *Id.*

(emphasis added). There was a long discussion and then “a rising vote of welcome to Nahant” by those officially speaking for the Town. Id. These assurances by NEU were given in direct response to the April 30, 1965 letter from Alexander on behalf of the Conservation Commission.

The following month, the GSA approved NEU’s application – thanks to Alexander’s support – awarding NEU the property for free, at a 100% public benefit allowance. Ex. 20, p. 124. While the application has not been located, the April 1965 proposal, incorporated by reference has been. Ex. 16. In the 1965 proposal, as assured to the Town by NEU’s president, NEU informed the GSA that it sought the property “in order to make it a wildlife preserve” and although “East Point contains several buildings that have undergone extreme vandalism . . . [o]nly one of these buildings will be used by the University” (Ex. 16, pp. 106-107), specifically, the barracks in the low-lying area ultimately renovated as be the MSC’s Edwards Laboratory. NEU acquired the property by deed in 1966. Ex. 26. The deed required NEU to maintain the property consistent with its Application,⁴ including the statement that NEU intended to maintain the property as a wildlife preserve. Id., p. 145. In short, Ruth Alexander was successful in securing the preservation of the site and in restoring public access to it.

In 1969, when NEU held a ceremony to dedicate its Edwards Laboratory, Town Moderator John Lowell thanked NEU: “Nahanterers are most grateful to Northeastern for restoring the area’s natural beauty and those of us who live close by are especially appreciative of the supervision being given the property by the University.” Ex. 47, p. 684. NEU reciprocated its thanks to the Town of Nahant, the Board of Selectmen and the Conservation Commission with a plaque acknowledging their assistance in acquiring the property. Ex. 48, p. 689.

⁴ The 1966 deed and reserved easement did not provide walking path access to ocean and cliffs for the Town; rather, provided access for the Navy to reach the remaining 8.3 acres of East Point, which it still owned.

3. The Town's Reliance on NEU's Assurances of Public Use and NEU's Preservation of the Wildlife Sanctuary for Over Thirty Years.

In or around 1974, NEU submitted a proposal to the GSA to acquire the 8.3 acres of East Point that had been retained by the Navy, as the Navy no longer needed it. Ex. 32. In that proposal, NEU states that “there is no natural boundary” between the site and that “if given control of both sites, Northeastern will request that the entire area be designated a marine wildlife preserve.” *Id.*, p. 173. Indeed, the plan attached to the proposal shows no development plans contemplated for the area on top of Murphy Bunker or to the east. *Id.*, pp. 178-179. The Town ultimately acquired the 8.3-acre portion of East Point instead and it later became Lodge Park. Ex. 50, p. 710. And as of 1977, as shown by Executive Director Dr. Riser’s 10-year report, the property was being maintained as an ecological reserve. Ex. 49, p. 704.

By 1988, thanks to NEU’s commitment, the wildlife sanctuary had matured into a lush, verdant habitat. Trussell Depo. 127-128. The Town owned the Lodge Park parcel and had since 1974 but it was still in a state similar to how the Navy had left it – a paved flat top with three, deep underground silos that had previously housed the Nike missiles. Ex. 57. Led by the Conservation Commission, now including NEU’s Joseph Ayers who would be named Executive Director of the MSC just two years later, the Town established the Open Space Committee to protect and manage the Town’s remaining open spaces and make recommendations on steps the Town could take to manage and preserve those spaces. Ex. 39.

On April 28, 1989, the Committee published the Nahant’s Open Space Plan, with member Joseph Ayers identified as an author. Ex. 39, p. 253. The 1989 Plan identified NEU’s property in the Town’s Open Space Inventory, as “public use” and as “education and conservation land.” *Id.*, pp. 262, 264. The results of the Committee’s survey of the resident’s use of public spaces, indicated that “East Point and the beaches were the places 90% said they

visited.” *Id.*, p. 279. The Open Space Plan set goals and objectives that included, *inter alia*, investigation of special zoning measures to protect open space. *Id.*, p. 270. At that time, East Point was zoned Residential. Ayers Depo., 61:12 - 62:3.

Also in 1989, the Conservation Commission, including member Joseph Ayers, issued its Request For Proposals for the Development of a Passive Recreational Area at the Henry Cabot Lodge Memorial Park, East Point, Nahant (“RFP”). Ex. 50. The RFP recounted the history of East Point, including the military occupation and NEU’s acquisition. *Id.*, pp. 709-711. It noted that NEU had acquired 24 acres in 1967 and that “[t]he northeast portion of the property and the rocky coast are maintained as a wildlife sanctuary and ecological study area”. *Id.*, p. 710 (emphasis added). The goal of the RFP was to “return East Point to the character it possessed prior to WWII.” *Id.*, p. 711. The pre-WWII character it sought to revive was a unified, natural peninsula open to the public to enjoy the cliffs and scenic views. Sears Aff. ¶ 3; Tarmy Aff., Ex. A, pp. 7-8; Spencer Aff., Ex. 1; Ayers Depo, 63:15, 64:13-22, 65:11-17. The Town sought to facilitate a rejuvenation and development of the former missile site for passive recreation to match what NEU had accomplished on its portion of the East Point peninsula. Indeed, the RFP noted that “[d]ue to its position in the migration pathways, East Point attracts a broad variety of endemic sea and migratory birds.” Ex. 50, p. 711. The RFP further stated that “[t]he elevated Nike site provides excellent viewing areas of the wildlife sanctuary maintained by Northeastern”. *Id.* (emphasis added). The RFP also built upon the work of the Open Space Committee: “East Point is a major component of the open space available in Nahant and has recently been proposed for rezoning as conservation land”. *Id.* Thanks in large measure to the effort of Joseph Ayers and the committees on which he served, and in reliance on NEU’s assurances and decades

of maintenance of the wildlife sanctuary for public use, the Town then renovated and re-dedicated the remainder of East Point, Lodge Park, as a contiguous public park.

And in 1990 and 1991, the Town of Nahant adopted a new zoning bylaw and map that designated the entire East Point peninsula as a Natural Resource District, protecting Lodge Park and the wildlife sanctuary as conservation land, restricting all non-conservation development. Ex. 51, p. 718 (Town Meeting voting to create a Natural Resource District, to include “East Point, including ... land owned and controlled by Northeastern University”); Ex. 4, p. 391. NEU did not object to the Natural Resource designation. Trussell Depo., 92:2-6.

Furthermore, from 1999 through at least 2008, the same language appeared on NEU’s MSC website, that “[t]he northeast portion of the property and the rocky coast are maintained as a wildlife sanctuary and ecological study area”. Ex. 86

NEU has further cooperated with the Town in other ways, such as creating a self-guided audiotour of East Point, treating the contiguous open space (Lodge Park and the wildlife sanctuary) as one piece. Ex. 52, p. 723 (“Welcome to East Point and the Northeastern University Marine Science Center. This site, which also includes property owned and managed by the Town of Nahant, boasts rich cultural and natural histories.”).

4. East Point is Now A Vibrant, Biodiverse Public Park Utilized by the Public for Wildlife Observation and Passive Recreation.

Other than the MSC in the lowlands of East Point, the entire peninsula now is a contiguous open space comprised of the Town of Nahant’s 8.3-acre Lodge Park and the 12-plus acre wildlife sanctuary. Ex. 53, pp. 731-733. The entirety of East Point has magnificent scenic views, with a 270-degree ocean view north to the North Shore of Boston, east to the Atlantic Ocean, and south toward Boston, with the Boston skyline easily viewable some 7 miles away.

Id.; Trussell Depo. 36:10-12 (“I agree that the views from East Point are, indeed, amazing, yes.”).

As the result of NEU’s and the Town’s preservation, wildlife has returned and flourished. In particular, this area became home to a wide variety of bird species, and a world-renowned home for migrating birds. Pivacek Aff. ¶ 4. Over 180 species of birds have been observed there, including birds listed as federally or state endangered, threatened or rare species. Id., ¶ 11, Ex. A. Birders from all over regularly visit East Point to view migratory birds in and about the wildlife sanctuary. Id., ¶ 10. Birders regularly organize field trips to the area to view such birds. Id., ¶¶ 9, 10; Trussell Depo. 116:13-21.

Just as importantly, as detailed at great length below (see **Argument II(A)(2)**), generations of Nahanters have known and used all of East Point, including and especially the wildlife sanctuary for a wide array of passive recreational activities including hiking, dog walking, fishing, star gazing – including a public observatory – flower-picking, photography, birdwatching, painting, ocean viewing and more. Exs. 60-78, 83, 84. Many lifelong residents of Nahant referred to the wildlife preserve as the Town’s playground and were even under the impression that it was owned by the Town because there is no distinction between the Town’s Lodge Park and NEU’s wildlife preserve. Id. It was generally understood that the wildlife preserve was protected, public open space that could not be destroyed at NEU’s, or anyone else’s, whim. Residents have been shocked to hear NEU’s claim otherwise. Id. The public uses detailed below continued from the 1960s until 2019, when NEU, without warning, began ordering residents out of the wildlife sanctuary and off of the bunker. Pivacek Second Aff. ¶¶ 18-26; Bauta Aff. ¶¶ 24-26. For the first time, security guards were stationed at the entrance and the public was denied access. Id. It was also in 2019 that NEU began tagging and cutting trees

and vegetation through the heart of the wildlife sanctuary. Even the so-called investigatory land clearing activities caused significant damage to the wildlife sanctuary. See Ex. 54 (Aerial and ground level photos that show the extent of the destruction to the wildlife sanctuary). The CSI project, if completed would clear almost the entirety of the wooded area on top of Murphy Bunker, scrape the 8-to-10 feet of earth from the top of the bunker, clear cut 5-plus-acres of the wildlife sanctuary and meadow for the installation of a geothermal wellfield and construct a 55,000 square foot building in the sanctuary's place. There would be nothing left of the wildlife sanctuary and the terrain and habitat would be forever lost.

PROCEDURAL BACKGROUND

On July 23, 2019, NPT Plaintiffs sent a c. 214, § 7A Notice to Sue to NEU, after which NPT had to wait the statutory twenty-one (21) days, until at least August 13, 2019 to file suit in Superior Court. However, on August 9, 2019, NEU brought a complaint against NPT Plaintiffs in the Land Court, seeking a declaratory judgment that NEU did not dedicate any portion of its property for public use. On August 20, 2019, NPT Plaintiffs filed a Verified Complaint consisting of five counts to challenge the ongoing destruction and pending destruction, primarily driven by Count II, which seeks declaratory relief that the wildlife sanctuary on the northeast portion of NEU's property has been dedicated for public use as a wildlife preserve and for passive recreation by NEU, creating a public easement and parkland protected under Article 97.⁵

NPT Plaintiffs moved for the Land Court to frame the dedication issue for a jury. NEU opposed that motion. On October 24, 2019, Land Court Judge Robert Foster ordered that a Superior Court jury must determine whether NEU intended to permanently dedicate the land to

⁵ "Article 97" refers to Article 97 of the Articles of Amendment to the Constitution of the Commonwealth of Massachusetts. NPT has pled that because NEU's dedication for public use is for passive recreation and wildlife observation purposes the nature of the public easement is protected parkland under Article 97. NEU has not disputed that if a dedication to public use is established, the land in question is protected from a change in use under Article 97.

the public for use as a wildlife preserve and for passive recreation and whether the public accepted that dedication. Ex. 88. Judge Foster subsequently denied NEU's motion for reconsideration of his jury frame order. Dkt. Entry dated 11/08/2019 in 19 MISC 000390.

On July 21, 2020, the Court allowed the Town of Nahant to intervene in the NPT Action and the Town brought claims identical to NPT Plaintiffs' public dedication and Article 97 claims, in addition to a promissory estoppel claim unique to the Town.

ARGUMENT

I. STANDARD OF REVIEW

A. Standard of Review for Summary Judgment.

Summary judgment is appropriate only where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Cassesso v. Comm'r of Correction, 390 Mass. 419, 422 (1983), quoting Mass.R.Civ.P. 56(c). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." Ng Bros. Constr. v. Cranney, 436 Mass. 638, 644 (2002). "On summary judgment the inferences to be draw from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." Hub Assoc., Inc. v. Goode, 357 Mass. 449, 451 (1970).

Summary judgment is not to be a trial by affidavit. Henshaw v. Cabeceiras, 14 Mass. App. Ct. 225, 229 (1982) (the duty of a trial judge, on a motion for summary judgment "is not to conduct a 'trial by affidavits' (or other supporting materials), but to determine whether there is a substantial issue of fact.") (internal quotations omitted). Where, as here, there is a dispute of fact involving witness testimony, the jury must be given opportunity to hear the testimony and

resolve credibility. Aldo v. Vivid Tech. Inc., 2006 WL 664188, at *2 (Mass. App. Ct. March 16, 2006) (vacating summary judgment because employee’s motivations for resignation should be determined by a jury based in part on credibility of witnesses); Town of Lunenburg v. O’Brien Homes, Inc., 2016 WL 3769296, at*2 (Mass. App. Ct. July 15, 2016) (reversing summary judgment because developer’s intent to be determined at trial).

In short, if a reasonable fact finder – here, the jury – *could* find dedication, it must be given opportunity to do so and summary judgment must be denied. Flesner v. Tech. Comm. Corp., 410 Mass. 805, 811-12 (1991) (finding summary judgment improper in wrongful termination claim where reasonable jury could draw opposite inferences from evidence); Sprague v. Waite, 34 Mass. 309, 320 (1835) (whether any particular strip of land dedicated to public use is a question of fact for a jury).

B. Standard of Review for Public Dedication.

NPT’s claim of public dedication concerns a right in the public to title in NEU’s property because the “consequence of a dedication is that ‘[t]he general public for whose benefit a use in the land was established . . . obtains an interest in the land in the nature of an easement.’” Smith, 478 Mass. at 63, quoting, Lowell v. Boston, 332 Mass. 709, 730 (1948). Accordingly, Article 15 of the Declaration of Rights of the Massachusetts Constitution provides a jury right to this question because “[i]n all controversies concerning property . . . the parties have a right to a trial by jury.” Parker v. Simpson, 180 Mass. 334, 344 (1902); Ex. 88, Northeastern Univ. v. Nahant Pres. Tr., Inc., 2019 WL 5959579, at *2 (Mass. Land Ct. Oct. 24, 2019) (Foster, J.) (“Nahant Preservation has a right to a jury trial on the question of whether Northeastern has dedicated the land in question to public use”).

As framed by the Land Court, in a public dedication case, three questions of fact are for the jury to resolve: 1) whether NEU intended to dedicate its property for public use as an ecological preserve and for passive recreation; 2) whether NEU intended to permanently do so; and 3) whether the public generally, and/or the Town of Nahant on behalf of the public, accepted the dedication. Ex. 88; see also Smith 478 Mass. at 63; Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 523, 525 (1887) (reversing trial court ruling that no dedication is possible for public park where trial court excluded evidence from the jury that the park had been dedicated and accepted by the public 15 to 19 years prior).

NEU's intent is a question of disputed fact "to be determined from . . . declarations, conduct and motive, and all the attending circumstances." See Town of Sudbury v. Scott, 439 Mass. 288, 302 (2003) (reversing summary judgment "[b]ecause the issue of [defendant's] intent at the time he took title is material to the outcome of the case, and because his intent is in dispute, summary judgment was not appropriate.") (emphasis added); see also Quincy Mut. Fire Ins. Co. v. Abernathy, 393 Mass. 81, 86 (1984) ("The granting of summary judgment in a case where a party's state of mind or motive constitutes an essential element of the cause of action is disfavored"); Aldo, supra.

This Court's review is not limited to two documents from 1965 because NEU's intent to dedicate does not have to be in writing to be found by the factfinder – it does not have to be in a deed, registered or provided as written assurances.⁶ See, e.g. Smith, 478 Mass. at 59 ("[t]he

⁶ NEU desires to limit NPT's case, NEU's history and the Court's review to two documents from 1965, in a vacuum, to argue the purported absence of its intention to dedicate its property for public use. NEU, for example, avers on page one of its Memo "as a matter of law, no statement in those documents constitutes a dedication." Memo at 1; see also Memo at 3 ("[NPT] must establish that over 50 years ago Northeastern manifested within the four corners of two documents . . ."); 4 ("there are no statements in either of the 1965 documents that could constitute a dedication"); 18 (NPT and the Town "point to two documents as proof that a dedication was made") 18-20 (primary argument focusing on passages from the two documents). NEU undermines its credibility by completely avoiding the context of those written statements and subsequent historical facts. NEU also ignores the law – that the intention to dedicate is established in large part by those facts. At any rate, the two documents on which NEU chooses to aim

dedication may spring from oral declarations or statements by the dedicator, or by those authorized to act in his behalf, made to persons with whom he deals and who rely upon them; or it may consist of declarations addressed directly to the public.”), quoting Attorney Gen. v. Onset Bay Grove Ass’n, 221 Mass. 342, 348 (1915) (“No formalities were necessary. It is settled at common law that the dedication need not be in writing”). Indeed, the word “dedicate” is not a magic charm that must be uttered by the dedicator or the public when accepting the dedication.⁷ See, e.g., Pleak v. Entrada Property Owners’ Ass’n, 2017 Ariz. 418, 424 (2004) (“[n]o particular words, ceremonies, or form of conveyance is necessary to dedicate land to public use; anything fully demonstrating the intent of the donor to dedicate can suffice.”).

Crucially, public use is evidence of both the public’s acceptance and of the dedicator’s intent.⁸ Public use “is competent, and often important, as bearing on the question of dedication, when that is in dispute; for if a man stands by, seeing the public use a way, permits it, and says nothing, it is very strong evidence to show an intention to dedicate.” Hayden v. Stone, 112 Mass. 346, 350 (1873) (emphasis added). When intention is in question, as it is here, “the ultimate use to which the land is put may provide the best evidence of the purposes”. Smith, 478 Mass. at 57 (internal quotation omitted) (emphasis added). Dedication “also may be manifested by the owner’s acts from which such an intention can be inferred.” Onset Bay, 221 Mass. at 348 (emphasis added); 11 A.E. McQuillin, *Mun. Corp.*, § 33:35 (3d. ed. 2021) (“intention” does not

its focus, particularly within the context as developed through discovery, are consistent with and supportive of the ample evidence of its conduct affirming its intention to dedicate the wildlife sanctuary for public use.

⁷ NEU spends much time fixated on the lack of the word “dedicate” appearing in the historic documents and the lack of the Town referring to the wildlife preserve as dedicated before NEU planned to destroy it. See, e.g., Bradley Aff. ¶¶ 16, 17 Memo at 23. This is a distraction. Until NEU made public its plans to renege on its 50-plus-year maintenance of the wildlife sanctuary as an open public park, the Town had no need to raise the issue. It was simply understood and accepted.

⁸ NEU’s Memo does not challenge acceptance and there is no serious dispute as to the public’s acceptance. The evidence clearly warrants a finding of public acceptance.

require actual intent because, based on the theory of estoppel, the landowner must be held to intend the reasonable and necessary consequences of their words and actions). Thus, NEU's intent to dedicate its property for public use could be found by a jury based on NEU's oral assurances, written statements and acts, together with NEU's and the public's 50-plus-year course of conduct. See also, Town of S. Hero v. Wood, 179 Vt. 417, 422 (2006) ("in the context of an implied dedication, the public's use of the land or resource in question looms large").

Further, under the common law principle of dedication, the 50-plus years of public use of the land commands a presumption of the dedicator's intent. See, e.g., Reed v. Inhabitants of Northfield, 30 Mass. 94, 98 (1832) (in context of dedication of a public way, it is "clear upon principle, that public easements, as well as others, may be shown by long and uninterrupted use and enjoyment"); Williams v. Inhabitants of Cummingtown, 35 Mass. 312 (1836) (use of a bridge by the public, and the erection and support of it by the town for 38 years, are sufficient to support the presumption of a dedication to public use); Valentine v. City of Boston, 39 Mass. 75, 81 (1839) ("[T]wenty years' use of land as a way would raise a presumption that it had been dedicated by the owner to the public for a way, and forty years' use will give the public a right of way over it"); Attorney General v. Tarr, 148 Mass. 309, 316 (1889) (finding dedication to public use where land in question had been continually used as a public landing from a time beyond memory of witnesses).

Under certain circumstances, as a jury could find here, a prolonged history of public use alone may be enough to meet the clear and unequivocal intent standard. Smith, 478 Mass. at 64. Smith left that question open for another day, finding that "[w]e need not determine whether it would have been enough to meet the clear and unequivocal intent standard that the land had been used as a public park for more than sixty years" because the court, in reviewing the "totality of

the circumstances” determined that the locus was dedicated as a public park because the city accepted federal conservation funds. Id.; see also Key v. Allison, 70 So.3d 277, 282 (Ala. 2010) (public dedication where public use of boardwalk without objection or hindrance from defendant or their predecessors for 100 years created a presumption of dedication or other appropriation to a public use and defendant did not overcome the burden that shifted to them to overcome the presumption); Doud v. City of Cincinnati, 152 Ohio St. 132 (1949) (“A dedication and acceptance of private property for a public use may result from the use of such property by the public, with the silent acquiescence of the owner, for a period of time sufficient to warrant an inference of an intention to make such dedication and to constitute such acceptance.”).⁹

The principles of the public dedication common law recognized as fully in force in Massachusetts under Smith require denial of summary judgment where the question of intent is in dispute. In Van Cleve v. Town of Eatonville, 135 Wash. App. Ct. 1049, *1, *3 (2006), the court vacated summary judgment for the Town after it sold 3.08 acres of undeveloped parkland, finding sufficient evidence to raise an issue of material fact on the Town’s intent to dedicate the lot. See also Armand v. Opportunity Management Co., Inc., 117 P.3d 123, 129-30 (Idaho 2005) (reversing summary judgment because the evidence was “ample to raise a genuine issue of material fact” as to whether landowner intended to dedicate lot for beach access); Rainwater v. Sumner Cnty., 342 S.W.3d 500, 503 (Tenn. Ct. App. 2011) (reversing summary judgment

⁹ NEU cites Newburyport Redev. Author. v. Commonwealth, 9 Mass. App. Ct. 206, 227 (1980), which relies on Hayden, 112 Mass. at 350, for the proposition that “mere user” cannot create a public dedication. Hayden discusses at length that an intent to dedicate is not necessarily a declaration but can be “made manifest” and that “acts of the parties to the dedication” complete it. Id. Furthermore, the jury in Hayden was not asked to decide the issue of intent as it is here, and Hayden further cautions that “[e]vidence of user is competent, and often important, as bearing on the question of dedication, when that is in dispute; for if a man stands by, seeing the public use a way, permits it, and says nothing, it is very strong evidence to show an intention to dedicate”. Id. at 350-51 (emphasis added). Smith plainly leaves open that in certain cases, sustained, long-term public use alone may, in fact, be sufficient. Whether this case meets what Smith contemplated need not be answered now. This is not a mere user case.

because intent to dedicate is an issue of fact that “may be inferred from the surrounding facts and circumstances...[and] extended use ... tend[s] to show an intent to dedicate”).

Where, as here, “the facts are in dispute or the evidence is conflicting, the intent of the dedicator is considered a question of fact for the trier of fact”. 77 Am. Jur. Proof of Facts 3d 1 §7 (Nov. 2018); Valentine, 39 Mass. at 81 (public dedication found by jury trial).

II. NEU’S ACTUAL FIFTY-PLUS-YEAR MAINTENANCE OF THE NORTHEAST PORTION OF THE PROPERTY AS A WILDLIFE SANCTUARY AND THE PUBLIC’S FIFTY-PLUS-YEAR ACTUAL USE, ALONG WITH NEU’S CONSISTENT PUBLIC STATEMENTS, AND NEU’S REPRESENTATIONS TO THE TOWN THAT IT WOULD PROVIDE ACCESS TO THE PROPERTY, ARE CLEAR AND UNEQUIVOCAL EVIDENCE OF NEU’S INTENT TO DEDICATE FOR PUBLIC USE.

Because “the ultimate use to which the land is put may provide the best evidence of the purposes” (Smith, 478 Mass. at 57) and because the dedication “may be shown by long and uninterrupted use and enjoyment” (Reed, 30 Mass. at 98), the dedication analysis in this case must begin with the actual historic use of the property as a public wildlife sanctuary. This is particularly so since the dedication and uses date back so far and there are few, if any, living witnesses to NEU’s acquisition, statements and intentions in 1965. See Tarr, 148 Mass. at 316 (dedication where land in question had been continually used as a public property from a time beyond memory of witnesses).

In fact, NEU’s 30(b)(6) witness readily admitted under oath that “because I was not there, I don’t know what Northeastern individuals and or government officials – what their mindset was during the time that this was all constructed” and “I can’t say for sure, again, what was in the minds of these folks”. Trussell Depo. 14, 19. NEU further testified that the definition of “wildlife preserve”, as NEU used it in its 1965 proposal, is unclear: “frankly [“wildlife preserve”] means different things to different people” and that “[t]here are many types and

flavors of wildlife preserve”. Trussell Depo. 23, 25. As NEU presently concedes, what it intended when it promised to maintain its property as a wildlife preserve in its 1965 proposal to the federal government is a question of fact, subject to interpretation, that is best resolved through the evidence of NEU’s and the public’s conduct since.

A. NEU’s Actual Fifty-Plus-Year Maintenance of the Wildlife Sanctuary and the Public’s Fifty-Plus-Year Actual Use for Wildlife Observation and Passive Recreation Create a Presumption of Dedication for Public Use and Sufficient Evidence to Deny Summary Judgment.

1. NEU Actually Maintained the Northeast Portion of the Property As a Wildlife Sanctuary for More Than Fifty Years.

The existence of the wildlife sanctuary is self-evident. What was barren is now lush and teeming with life. Exs. 53, 55. NEU admits that it allowed the flora and fauna to return to the previously barren areas of the property. Trussell Depo. 122. The trees and green vegetation started coming back in the early 1980s. *Id.*, 127-128; Ex. 57 (photos of growth of wildlife sanctuary over time). It was an intentional decision by NEU to preserve and protect the area by letting the habitat naturally evolve. Ayers Depo. 136-37. The site is now a diverse and ever-evolving wildlife habitat, an ecosystem that has been successfully fostered by NEU. Ayers Depo. 20; Ex. 53. Sixty-four species of native bees have been documented at East Point. Ayers Depo. 194. Ayers testified that “a family of foxes that moved into East Point . . . wiped out all the oriental pheasants [and] got many of the ducks.” *Id.*, 100. More recently, “we’ve had a family of coyotes that scared out all the foxes”. *Id.* “[A]t night, when it’s low tide . . . and the whole area is covered with marine rats, and they live on seafood.” *Id.*, 25. There are “plenty of owls”, “the owls feed on the rats.” *Id.*, 190-91.

NEU, correctly, refers to the area to the east of Murphy Battery as a “thriving meadow” on its website. Ex. 59. Birders flock to the wildlife sanctuary every year to observe and

document hundreds of species of migratory birds that spend time in what is known as a migratory bird fallout. Pivacek Aff. ¶¶ 9-11; Trussell Depo. 28. Its natural beauty is undeniably resplendent. Trussell Depo. 36:10-12; Exs. 53, 55; Ex.52.

2. NEU Actually Allowed the Public To Use, and the Public Has Used, the Northeast Portion of the Property as a Wildlife Sanctuary for Passive Recreation for More Than Fifty Years.

Evidence of the public's access, use and enjoyment of the wildlife sanctuary is overwhelming and has been a consistent fact of life in Nahant for decades. Each of twenty-seven citizen plaintiffs responded to NEU's interrogatories on the issue of access and use. NPT submits herewith additional affidavits from Calantha Sears, 100-year-old lifelong resident of Nahant, Lynne Spencer and Julie Tarmy, who have particular and personal knowledge of East Point's use as Nahant residents and through their work with the Nahant Historical Society. As detailed below, the public has used the wildlife sanctuary for over 50 years for passive recreation activities, including hiking, dog walking, fishing, star gazing – including a public observatory – flower-picking, photography, birdwatching, painting, ocean viewing and more.¹⁰

The Public's Open, Unfettered Access:

"It was an open, public park." Exhibit 62, p. 780. This is a sentiment and understanding echoed by many other residents. Ex. 61, p. 768 ("[I] never knew who owned the property and assumed it was public land"); Ex. 63, p. 792 ("Until NEU's project proposal, it was [my] understanding and belief that the land was under conservation restriction and protected from development."); Ex. 64, p. 803 ("The open space at East Point, all of it together, is Nahant's

¹⁰ NEU's reliance on Longley v. Worcester, 304 Mass. 580, 588 (1939) for the proposition that a dedication requires "an intention to permanently abandon his property to the specific public use" is misplaced. There, the court said there was no dedication because there was an agreement between railroad and the public entity upon which the dedication theory was based was terminable on 30 days' notice and was, therefore, not a permanent abandonment. Here, NEU maintained the property as a wildlife preserve and allowed public access for 53 years before attempting to revoke the dedication and all of NEU's purported uses of the wildlife preserve in that time are entirely consistent with the purposes of the dedication – passive recreation and wildlife preservation and observation.

public playground and always has been.”); Ex. 65, p. 815 (“[I] did not know who owned what portion of East Point.”); Ex. 66, p. 826 (Third generation Nahant resident – “To my knowledge, the entire property at East Point has always been used as a public park and everyone was welcome.”); Ex. 67, p. 838 (“I have never had any idea who owned the natural portion of East Point. All of the trails connect and it is a contiguous parkland.”); Ex. 68, p. 849 (Nahant resident since 2004, who could see NEU’s property from his property observed “people both from town and from out of town access and freely enter Northeastern’s property to hike, walk dogs, fish and bird watch.”); Ex. 69, p. 863 (used the property before the Town acquired and dedicated Lodge Park, when, at that time, there were “trails into [the] valley from and around Murphy Battery.”).

Public access to and use of the wildlife sanctuary was not limited or restricted in any way. Ex. 62, p. 780 (“Members of the public did not have to seek permission or approval to enter and recreate at East Point. No one ever asked members of the public to leave.”); Ex. 70, p. 874 (“NEU always allowed and welcomed public. . . friends and family had unfettered access to the property.”); Ex. 70, p. 887 (“I had free access to this part of Northeastern’s property and walked unimpeded through it.”); Ex. 72, p. 897 (“the university’s lands on East Point have been open with unfettered access until [NEU] began to prohibit access to certain areas because of construction or testing.”); Ex. 73, p. 917 (“The public has maximum access of and use of the entirety of East Point.”); Ex. 74, p. 929 (“East Point, including the area on top of and to the east of Murphy Battery has been open for public use at least since he moved to Nahant in 1973.”). William Mahoney, a lobsterman born in 1948 and lifelong Nahant resident, recalls that when the U.S. military owned the property, military personnel would remove kids playing at East Point. Ex. 75, p. 941. When NEU took over the site, that changed, and “it was freely opened to the public for recreation and use.” Id. Ayers treated the property “as a community center”. Id.

Walking, Hiking and Dog Walking:

Members of the public regularly, even daily, use the well-trodden trails, maintained by NEU for the public, through the wildlife sanctuary on top of Murphy Battery and through the thriving meadow. Ex. 61, p. 768; Ex. 71, p. 887. The trails and paths through the wildlife sanctuary seamlessly connect to the public walking paths at Lodge Park. Ex. 76, p. 953 (used the area on top of and to the east of the Battery to walk his dog and allow his dog to run freely through the open space); Ex. 64, p. 802 (“always walked the open space at East Point.”); Ex. 72, pp. 897, 904 (“I walk the area of East Point below Lodge Park almost daily.”); Ex. 73, p. 917 (“I have lived in Nahant for 16 years . . . Every time I have a new visitor, the first thing we do is go to East Point. We hike along the trails on top of and to the east of Murphy Battery and where the observatory used to be. We use the well-worn path through the wild areas.”). See also Ex. 74, p. 929; Ex. 75, p. 941.

Children and Youth Free Play:

As one would expect in a public park, beginning in the 1960s-70s, children have had free reign of the open space that is the wildlife preserve. Nahant resident since 1960, Andrea Murphy, “remembers going to the fields to the east of Murphy Battery when she was about 10 years old or so . . . With friends, she would ride bikes up to East Point, wander and play on top of the bunker and in the meadow.” Ex. 61, pp. 767-768; Ex. 62, p. 780 (“children would go with their friends to East Point and have unstructured, unsupervised free play in all parts of East Point on top of and to the east of Murphy Battery.”); Ex. 70, pp. 874-875 (the meadow was a playground for her and her friends. East Point was a place of open access and open play. The kids in the neighborhood would spend hours there with no parents.”); Ex. 64, p. 803 (“kids and their friends would regularly climb along the rocks all the time and use the well-worn paths

down from the Battery and through the meadow.”); Ex. 75, p. 941 (“For many years there was a rope swing in a tree on top of the Battery. Youths from Nahant would freely and regularly use the rope swing whenever they wanted. It was a popular hangout spot.”).

Birdwatching and Nature Observation:

Another, perhaps most notable, public use is birdwatching and wildlife observation in the wildlife sanctuary. East Point is a unique place for bird watching. Over the past 50 years, East Point has matured from a barren former military site to a lush wildlife preserve headland that serves as a “fallout” for migratory birds. Pivacek Aff. ¶ 3. Birder and Nahant resident of 50 years, Linda Pivacek, has made countless trips to East Point, including the wildlife sanctuary, for bird and butterfly surveys and group trips, making at least 24 visits per year for more than a decade. *Id.* ¶ 8. Birding trips to East Point for observation or to count birds for bird inventories have been made by Winter Waterfowl Counts, Salem Sound Coastwatch, Nahant Open Space Committee, Massachusetts Audubon Society, annually, and Brookline Bird Club. *Id.* ¶10.

Over 180 species of birds have been observed at East Pont, including state and federally protected species. Pivacek Aff. ¶11. A list of historical bird observations going back to 1986 that were compiled and submitted by bird watchers at East Point can be accessed at the Cornell website eBird.org.¹¹ *Id.*; see also Ex. 67, p. 838 (“I use the property...[for] bird watching.”); Ex. 77, p. 962 (“My father, who died in 2006 at age 92 and lived on Nahant for 36 years, was an avid bird-watcher who enjoyed the site frequently, and many in our family have carried on that tradition, bringing our binoculars and birding scopes.”); Ex. 67, p. 838 (resident enjoyed the area east of Murphy Battery at East Point for wildlife observation, including watching seals on the beaches); Ex. 73, p. 918 (“The public used the wildlife area for bird watching and wildlife observation.”); Ex. 72, p. 906 (“other residents were conducting nature-based activities,

¹¹ <https://ebird.org/hotspot/L447860>

including beekeeping, botanical studies, and bird observations”); Ex. 67, p. 838 (“I enjoy running and biking to the top of Lodge Park, which is also frequently used for observation of flora, flowers and trees.”); Ex. 78, p. 978 (East Point is “a home to wildlife such as pheasants, owls, and foxes. I assumed that it was protected, and that was the joy about it.”).

Stargazing and Use of the Public Observatory:

In 1995, Peter Foukal, a local astronomer, constructed a public observatory on top of Murphy Battery. Exs. 37, 79, 80, 81. Dr. Foukal coordinated the installation of the public observatory with both NEU and the Town. Cullinan Depo. 55:5-9. While the public has often engaged in stargazing at East Point with the naked eye due to the lack of light pollution, with the public observatory, the public was afforded an opportunity to more closely observe and study solar and celestial events. Dr. Foukal wrote that “[i]n 1995, I got permission from my NSF program manager to build a small public observatory in Nahant.” Ex. 80. Dr. Foukal “built the Nahant, Mass., observatory to share the wonder of astronomy with the public.” Ex. 79. The public solar observatory “is open to Nahant residents for evening viewing of the Moon and planets, on most Friday evenings in the fall.” Ex. 81.

In 1998, a Boy Scout, as a public service project for the rank of Eagle Scout, constructed wooden stairs with a rope handle to provide members of the public a safer means to access the top of Murphy Battery. Trussell Depo. 141; Ex. 82. The Eagle Scout project was “to give area residents access to the NASA station to view the stars.” Ex. 82.

The public has used those stairs regularly since to access the top of Murphy Bunker, not only to use the public observatory. Ex. 83, p. 997 (Nahant resident since 2004 would “walk with my dog up the rope steps to top of the bunker and down to the field. During big snowstorms, I would go up to the top of the bunker with my dog and would walk through and around the

meadow.”); Ex. 71, p. 887 (“daily routine to hike to the top of the Battery with my dog, and then continue down into the valley before walking back up to Lodge Park. This was easy to do thanks to the stairway constructed by Nahant Boy Scouts that allowed members of the public to climb to the top of the bunker from the roadway off of Canoe Beach”); Ex. 72, p. 906 (“Along the path that leads to the eastern perimeter of East Point, to the left of Murphy Battery, there is a loosely constructed wooden-and-beaten earth stairway to the top of Murphy Bunker. I often climb these stairs, on my way to the top of Murphy Bunker and then continue onward to Lodge Park.”)

Special Services, Family Gatherings and Events:

It is not just individuals and families that utilize the public open space that is the wildlife preserve. The Village Church held sunrise Easter services in the meadow of the wildlife sanctuary through the 1980s to 2000s. Ex. 60, p. 757; Ex. 75, pp. 941-942. The Girl Scouts of Nahant collected and documented plant species from the meadow of the wildlife sanctuary in the 1960s. Ex. 60, p. 757. An annual Victoria Day walk proceeds onto and through the wildlife preserve. Ex. 61, p. 968. “There were scouting activities [in the unwooded portions of East Point].” Ex. 72, 906. Peggy Silva, a Nahant teacher, along with her colleagues, used to take students from the Johnson School to the property for field trips and for school photographs. Ex. 75, p. 941. Michelle Capano, Nahant resident of 49 years, notes that “members of the public use East Point, including the area on top of Murphy and to the east for weddings, family photos, proposals, picnics, hiking and walking.” Ex. 65, p. 815.

Fishing From the Cliffs:

On most days, members of the public can also be seen fishing from the cliffs that line the wildlife sanctuary. Ex. 84, p. 1009; Ex. 61, p. 968; Ex. 67, p. 814 (“[Always saw] fishing from the coastal rocks.”); Ex. 75, p. 941 (the public uses East Point for fly fishing and scuba diving).

3. The Half Century Of Preservation As A Wildlife Sanctuary And Public Use For Passive Recreation Create A Presumption of Dedication And Sufficient Evidence To Deny Summary Judgment.

The half century of conduct – by NEU and the public – as set forth above creates a presumption of NEU’s intention to dedicate the wildlife sanctuary for public use. See Reed, supra; Williams, supra (use of bridge and erection and support by town for 38 years sufficient to support the presumption of dedication); Bess v. City of Humboldt, 3 Cal. App. 4th 1544, 1551 (1992) (60 years of public use strong evidence of dedication); Penn. R. Co. v. City of Girard, 210 F.2d 437, 443 (6th Cir. 1954) (public use of crossing over railroad for more than 21 years created a presumption of dedication). Moreover, here, there is no evidence of an intent not to dedicate by NEU, such as express statements, objections to public use of the property, fencing or enclosing the property.¹² See 11 A.E. McQuillin, Mun. Corp., § 33:41 (3d. ed. 2021). There is no fencing around NEU’s property or to otherwise demarcate the boundary between Lodge Park and the wildlife sanctuary and trails in and from Lodge Park connect to the wildlife sanctuary without interruption. Ex. 71, p. 888 (“NEU never took any actions to limit or impede access to the area. There was no signage visible.”); Ex. 64, p. 803 (Resident of Nahant since 1973 – “was never given the impression by anyone that she and the public should not be there or were not permitted there.”); Ex. 65, p. 815 (“There were no signs or fences, and no one ever asked her and her friends to leave or restricted their access.”); Ex. 72, p. 903 (“[NEU] never took any action to

¹² NEU has submitted newly minted affidavits from Trussell, its 30(b)(6) deponent and Ayers, the only other witness from NEU to be deposed. The late effort to backfill the holes in their deposition testimony fails to do so. Trussell states that it is “clear” that NEU sought to restrict access to the property through the use of “No Trespassing” signs. However, his assertion not only lacks any foundation as to what had been done decades prior, but he does not say where the signs were purportedly posted, when they were installed or how many there supposedly were or are. Trussell Aff. ¶ 99. Ayers fares no better on this point, failing to state where, when or how many purported signs were posted. Ayers Aff. ¶ 48. James Ward, for his part, lacks any foundation to claim that “in the 1960s, 1970s” NEU maintained a security guard or a caretaker at its entrance who “would not allow the public onto the property” and maintain security 24/7. Ward Aff. ¶¶ 20, 22. The presence of any such signs and the practice of excluding the public is disputed and refuted herein. At any rate, the four new affidavits submitted with the Motion merely stack 261 new paragraphs of facts on top of the massive bonfire of factual disputes burning in this case.

limit access on the lands to the east and on top of Murphy bunker. They did not build restrictive paths to keep the public confined to the easements. Indeed, the University never monitored the public's use of this area of their campus".); Ex. 66, p. 827 ("No one ever deterred us from using the entire property"); Ex. 74, p. 930 ("Until 2018, Respondent was never asked or made to leave East Point and never prevented from fully using and enjoying all of the open portions of East Point.").

NEU's response to the parade of Town residents' sworn testimony as to their access and use is, in short, that they are lying. Trussell Depo. 148 ("just because someone signs a document saying they're, you know, going to not lie, it doesn't mean that they won't"); 148-49 (Mahoneys have had "a tenuous grip on reality and truth" and "take liberties with the truth"); 153 ("Simply not true, Bill [Mahoney]); 155 ("I don't agree with that at all" in response to Monteith's responses to interrogatories); 156-57 (does not agree with Capano's sworn statements on public use); Ayers Depo. 169-170 (NPT and residents are "hostile").

Other than self-serving affidavits and an internal memo on policy from 50 years ago, NEU has not produced any physical evidence of any member of the public being excluded, removed, ordered to leave, fined or prosecuted for trespassing – no logs of such activity, no private security reports and no police reports. To the extent NEU disputes the factual record of its and the public's 50-year history at East Point, NEU's dispute is a marked change only recently adopted in order to destroy the wildlife preserve that it and the Town of Nahant have intentionally protected and to replace the sanctuary with an institutional monument with a private, prestigious view. Ex. 85 (internal NEU memo stating that moving the building off the Bunker would "Lose 'Prestige'").

NEU's denial, at times, of the very existence of the wildlife preserve (Trussell Depo.

25:22-24) and the public's access to it reflects NEU's current bias under new administration and staff rewriting the institutions' commitments over the past half century to serve its current objectives. But the current administration is bound by its past public dedication. When, as here, "the intent to dedicate is declared or made manifest, and such dedication is accepted, the land becomes subject to the easement of a public way ... [and] the owner cannot withdraw his dedication." Hayden, 112 Mass. at 349–50 (internal citations omitted).

At the very least, the contradictory claims on public use and access, as they inform the present day understanding of NEU prior dedicatory intent, create a credibility issue for the jury to resolve. Flesner, 410 Mass. at 809, 812 (summary judgment reversed where motive for employee's discharge at issue, indicating "jury should ...observe the demeanor...of the witnesses whose states of mind are at issue"); Aldo, supra (vacating summary judgment because employee's motivations for resignation should be determined by a jury based in part on credibility of witnesses).

B. NEU's Consistent Public Statements and Conduct Since 1965 Further Show Its Intent to Maintain a Wildlife Preserve.

For at least a decade, NEU prominently, publicly proclaimed that it maintained as a wildlife sanctuary on the northeast portion of its property. Some fifty-five (55) captures of the NEU MSC website's history page from 1999 through at least 2008 by the Internet Archive (aka "Wayback Machine") confirm that the website consistently included the proud averment that "[t]he northeast portion of the property and the rocky coast are maintained as a wildlife sanctuary and ecological study area". Tobin Aff. ¶¶ 5,6; Ex. 86. See Walsh v. Teltech Sys., Inc., 2015 WL 12856456, at *1, n. 2 (D. Mass. July 30, 2015), aff'd, 821 F.3d 155 (1st Cir. 2016) (judicial notice of Wayback Machine). In plain English, the term "wildlife sanctuary" is well understood

and commonly defined as “an area where wild animals and plants are protected”.¹³

The lineage of wildlife sanctuary touted by NEU traces back to 1965, when NEU promised the federal government and the public that if it acquired the barren property, it would maintain it as a “wildlife preserve.” Ex. 16, p. 106. In all that time and since, NEU never developed the area on top of Murphy Battery or the meadow to the east, leaving the land untouched. Trussell Depo. 70, 71. The only structure ever placed in the wildlife sanctuary was the public observatory constructed and operated by an astronomer unaffiliated with NEU on top of the Murphy Battery. Trussell Depo. 26:19-27:6. As discussed, the Town relied on NEU’s assurance to support and recommend NEU’s acquisition, which ultimately resulted in the government’s award of the property to NEU. That assurance was also incorporated by reference in the deed’s 20-year covenant. And that lineage includes identical language in the 1989 RFP approved by Ayers, pursuant to which the Town developed Lodge Park.

The Town’s efforts to preserve East Point, including the wildlife sanctuary on the northeast portion of NEU’s property, in reliance on NEU’s statements and conduct and in cooperation with NEU, are further, strong, evidence of NEU’s intent to dedicate the wildlife sanctuary for public use and the public’s acceptance through the Town. It is also evidence supporting the Town’s related promissory estoppel claim as the Town relied on NEU’s preservation and the public’s use of the wildlife sanctuary to raise and expend funds to renovate and dedicate Lodge Park.

Even if the public never set foot in the wildlife sanctuary – which of course is not the case – a reasonable jury could find that the NEU intended to permanently dedicate the northeast portion of the property as a wildlife sanctuary and as a public open space for passive recreation.

¹³ Collins English Dictionary <https://www.collinsdictionary.com/us/dictionary/english/wildlife-sanctuary>

C. NEU’S Oral and Written Assurances to the Town of Nahant That It Would Provide Public Access to the Property, Thereby Restoring Historic Public Access to the Site, Were Reasonably Relied on By the Town, Enabled NEU to Acquire the Property, And Constitute A Dedication For Public Use That Cannot Be Revoked.

Nearly sixty years of maintenance, use and protection of a public wildlife sanctuary is strong, probative evidence, of both the public’s acceptance and NEU’s intent to permanently dedicate the wildlife sanctuary for public use. But there is much more to this case.

Turning, finally, to the two 1965 documents that NEU characterizes as “smoking guns” that miss the mark, with the full contextual background of that time and the consistent conduct since, these two documents are better seen as the final nails in the coffin. Everything that the wildlife sanctuary is today – the thriving meadow, the vibrant habitat, the well-used public space, and the conservation efforts of the Town – all flow from and are a product of the written and oral assurances made by NEU in 1965.

Over the course of two weeks in 1965, from April 30 to May 17, NEU assured the Town of Nahant and the Conservation Commission that it would be a good steward of the land and find a way to restore the public’s access. While the effort to formalize those assurances into a written easement did not come to fruition, such written easement is not necessary for a jury to find NEU’s clear intent to dedicate the property for public use. The Nahant Conservation Commission, including its Chair, Ruth Alexander, relied on those oral assurances, some of which were recounted in writing in the form of a letter from NEU President Knowles promising access so the public could enjoy the ocean and cliffs, to move the GSA to approving NEU’s application. That application included the promise to maintain a wildlife preserve and to not develop the area on top of the Murphy Battery and to the east. The assurances from that application were further codified by reference in the 20-year covenant in the deed.

When NEU was confronted in 2021 with the assurances that NEU made to Ruth Alexander and the Town of Nahant in the spring of 1965, its response was flippant and condescending. NEU did not dispute that the assurances were made but NEU now says that “assurances are not legally binding”. Trussell Depo. 55. When Ruth Alexander received assurances from the NEU President that he would work with her to provide a pathway across the property so the people could enjoy the ocean and cliffs, Trussell said that “[a]ssurances are always made in the process of negotiation[,] [t]hat doesn’t mean that the outcome is going to be what people necessarily seek”. Trussell Depo. 49. Although Alexander received assurances from NEU that only low-lying or otherwise inconspicuous buildings would be contemplated, Trussell said “[a]ssurances are not hard binding, legally binding contracts of the agreement”. Trussell Depo. 60. That NEU President Knowles assured the Town that NEU would work with the town in the development of a walkway for the public to see the ocean and cliffs, Trussell said “[p]eople say all kinds of things in these discussion[s][,] [t]hey reserve the right to change their mind. This pathway was never granted.” Trussell Depo. 53-54; and 67 (“assurances are not a written legally binding agreement”).

Ruth Alexander and the Conservation Commission supported NEU’s acquisition to the GSA. The GSA awarded the property to NEU at a 100% public benefit allowance and in consideration of Alexander’s support and in consideration of the benefit to the public. Alexander caused NEU to acquire the property because of the assurances from the President of NEU that he would work with her to develop public access. Trussell laid NEU’s current position bare: “[t]he president assured her, but her biggest mistake was anticipating that she would get exactly what she wanted. Anticipation is not an agreement.” Trussell Depo. 60 (emphasis added).

Ruth Alexander did not make a mistake. Nor did the Town. The Town of Nahant and the public accepted NEU's dedication of the northeast portion of its property for public use as a wildlife sanctuary and for passive recreation and NEU cannot change its 50-year intention to dedicate now. Smith, 478 Mass. at 59; Onset Bay Grove Ass'n, 221 Mass. at 348. Public dedication law exists precisely to prevent what NEU is trying to do, rescind its dedication 50-plus-years later. Once dedicated and accepted, owners are bound by the dedication. City of Cincinnati v. White's Lessee, 31 U.S. 431, 432 (1832) ("being thus set apart for public use, and enjoyed as such . . . the law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication."); Hayden, 112 Mass. at 349–50 (same).

III. THERE IS MORE THAN SUFFICIENT EVIDENCE OF INTENTION TO DEDICATE TO DENY SUMMARY JUDGMENT, AND THE JURY-FRAMED QUESTIONS REGARDING DEDICATION MUST BE ANSWERED BY THE JURY

The assurances and statements by NEU spanning decades alone create a triable issue of fact as to NEU's intent to permanently dedicate the northeast portion of its East Point property as a wildlife preserve and sanctuary for public use. There is no real question as to the public's acceptance and use, which explains why NEU glaringly avoided it in their Memo. There is a genuine dispute as to what NEU meant by "wildlife preserve" and "wildlife sanctuary" and as to NEU's history of actions, which must be resolved by a jury. It must be for jury to decide what NEU meant when for decades it said that it maintained the northeast portion of the property as a wildlife sanctuary and there is strong evidence that NEU did exactly that and the public treated and used it as such. Use alone would be sufficient under Smith; but use plus NEU's assurances, cooperation with Town preservation efforts and decades of other statements – all consistent with an intent to dedicate – make it unquestionably a jury issue. Summary judgment should be denied.

Respectfully submitted,

Nahant Preservation Trust, Inc. and Twenty-
Seven Named Citizens of the
Commonwealth of Massachusetts

By their attorneys,

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February 3, 2022

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document by email and U.S. Mail on Kevin O'Flaherty on February 3, 2022.

/s/ Harley C. Racer
Harley C. Racer













COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

ESSEX, ss.

LAND COURT
95 MISC 222901 (JSDR)

HOWARD E. STEMLER, *et al.*,

Plaintiffs,

v.

COMMONWEALTH OF
MASSACHUSETTS,

Defendant.

THE COMMONWEALTH’S MOTION TO REOPEN DISCOVERY

Defendant Commonwealth of Massachusetts (the “Commonwealth”) hereby moves to reopen discovery for a period of six months. As the Court is aware, this case involves deed language in the Plaintiff’s chain of title going back to 1887, conveying the “rocks and ledges” “upon the condition that they forever remain open to the general public.” The Plaintiff brought this case in 1995 seeking to eliminate that condition from her deed.¹ As set forth below, the Court should reopen discovery on the issue of public acceptance for six months.

Background

After the Court issued its summary judgment decision in 1997, it appears that this case went dormant until the Commonwealth filed a motion to dismiss for want of prosecution in 2003. The Court denied the motion and, thereafter, the Plaintiff filed a motion to compel discovery and a request to schedule a trial date. Thereafter, the Commonwealth produced discovery to the

¹ Plaintiff Howard E. Stempler no longer has an interest in the property. The Commonwealth suggests that he should be dismissed from the case pursuant to Mass. R. Civ. P. 21.

Plaintiff, including a list of over 128 witnesses, 47 of which were confirmed they would testify at the trial. *See* Ex. A. Once the Plaintiff received the discovery and list of witnesses, her counsel withdrew the motion to compel and request for trial on January 14, 2005. No further activity took place until 2022.

Based upon the date of the deed and the twenty-year delay, counsel and the Court reasonably assumed that there would be no witnesses alive to testify as to pre-1950 use of the rocks and ledges. The Court therefore set an abbreviated discovery schedule to produce relevant documents, which was then extended to August 26, 2022.

After the Commonwealth designated potential exhibits for trial and the Plaintiff filed a motion in limine to exclude certain exhibits on the basis of hearsay and relevance, it became apparent that the parties' prior assumption was incorrect. Counsel for the Commonwealth, in a short period of time, have received emails and phone calls from over forty individuals. At least twenty of them have either personally used the rocks and ledges in front of the Plaintiff's property prior to 1950 or can testify as to their family's use of the rocks and ledges prior to 1950. This includes one ninety-five-year-old woman who has family videos from the rocks and ledges dating back to the 1930s, as well as one eighty-year-old woman whose family has used the rocks and ledges for generations. Some individuals have also forwarded photographs of people using the rocks and ledges dating back to the early 1900s. Based on initial conversations, these individuals will be able to testify as to their family's use dating as far back as the late 1800s. In addition, the president of the Massachusetts Association of Bird Clubs indicated that Andrews Point is a world-famous birding location, and he has found evidence of outings at Andrews Point. He has also reached out to members of the clubs because birders maintain journals of bird sightings. From speaking with these individuals, it is clear that the public has extensively used

the rocks and ledges in front of the Plaintiff's property for generations and that it is an incredibly important public resource for those who do not own waterfront property.

Argument

“The conduct and scope of discovery is within the sound discretion of the judge.” *Solimene v. B. Grauel & Co., K.G.*, 399 Mass. 790, 799 (1987). “Discovery procedure must have the capacity of flexible adjustment to changing groups of facts.” *MacPherson v. Boston Edison Co.*, 336 Mass. 94, 105 (1957) (internal quotation omitted). Ultimately, discovery rulings should be entered with the goal of “conducting[] a fair and orderly trial.” *GPH Cohasset, LLC v. Trustees of Reservations*, 85 Mass. App. Ct. 555, 561 (2014). These guidelines all warrant a reopening discovery.

Here, current counsel have only been actively involved in this case for less than one year (May 2022). Prior counsel for the Commonwealth, however, identified more than forty witnesses that were willing to testify as to their use of the rocks and ledges. After the Commonwealth exchanged that list, this case went dormant for more than twenty years, during which time, many of the witnesses died. Due to the delay, it was reasonable for the parties to assume that witnesses would not be available to testify and that the parties would rely on documents to prove their case. The Court's order expediting discovery was based on this assumption, but as evidenced above, that assumption has now proven incorrect. *See* Docket Entry (May 4, 2022) (“The court, noting that it is highly unlikely there will be any living witnesses, inquired as to whether this case would be appropriately presented as a case stated... The foregoing considered, in 95 MISC 222901 the court set a discovery deadline of August 5, 2022...”). With the change in operative facts, it is only fair to reopen discovery to obtain highly relevant evidence. Such discovery would be limited to the issue of acceptance by the public, but

the Commonwealth requests that it not be limited to the witnesses or documents previously identified.

Equitable considerations also warrant reopening discovery. The deed restriction has been in place since 1887 and the Plaintiff was fully on notice of it when she purchased her property. The portion of the rocks and ledges in front of the Plaintiff's property have been used by generations of Rockport residents and tourists. To best defend this case and protect this important public right that has existed for over one hundred years, a short extension in discovery is reasonable. Moreover, the Plaintiff can hardly claim prejudice for such a short extension after waiting twenty years to reactivate the case.

Given the possibility of the identification of many witnesses, the Commonwealth proposes a staggered discovery schedule to prevent the unnecessary expenditure of the parties' resources. During the initial four months, counsel for the Commonwealth will endeavour to obtain and subsequently disclose any newly acquired documents and witness affidavits. At the close of the four months, the Commonwealth will identify key witnesses and schedule with the Plaintiff's counsel relevant depositions during the remaining portions of the re-opened discovery period. The Commonwealth reserves the right to conduct trial preservation depositions outside of the schedule set forth above for any witness, as necessary, due to their age or medical condition.

Conclusion

For the foregoing reasons, the Commonwealth respectfully requests that the Court allow this motion, reopen discovery on the issue of public acceptance, and set a new discovery deadline of Monday, August 14, 2023.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Respectfully submitted,

THE COMMONWEALTH OF
MASSACHUSETTS,

By its attorneys,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL,

/s/ Kendra Kinscherf
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Dated: February 13, 2023


CERTIFICATE OF SERVICE

I, Kendra Kinscherf, Assistant Attorney General, hereby certify that I have this day, February 13, 2023, served the foregoing document upon all counsel of record by emailing a copy to:

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/s/ Kendra Kinscherf
Kendra Kinscherf

NOTICE OF DOCKET ENTRY	DOCKET NUMBER 95 MISC 222901	Commonwealth of Massachusetts Land Court Department of the Trial Court 
CASE NAME <div style="text-align: center;"> Howard E. Stempler , et al. </div> <div style="text-align: center;"> v. </div> <div style="text-align: center;"> Attorney General of The Commonwealth of etc Representative of Any Member of the General Public Claiming An Interest In Certain Land, Rocks etc </div> <div style="text-align: right;"> , Plaintiff(s) , Defendant(s) </div>		
NOTICE ISSUED TO	COURT ADDRESS & PHONE NUMBER	
Vincent J Pisegna, Esq. Krokidas and Bluestein 600 Atlantic Ave Boston, MA 02210	Land Court Three Pemberton Square Room 507 Boston, MA 02108 (617)788-7470	
<p>Notice is hereby given that the following docket entry has been made in the above captioned matter:</p> <p>Notice of Docket Entry: There being no opposition thereto, The Commonwealth's Motion To Reopen Discovery is ALLOWED. A new discovery deadline of September 8, 2023 is hereby established. A further status conference will be held at 9:00 a.m. on September 19, 2023.</p> <p>Email notice to: Attorney Jason B. Curtin; Attorney Vincent J. Pisegna; Attorney Kendra Kinscherf; Attorney John Dupuis; Attorney Amy E, Kwesell; and Attorney Robin Stein.</p> <p>Judge: Roberts, Hon. Jennifer S.D.</p>		
DATE ISSUED: 03/08/2023	RECORDER: Deborah J. Patterson	

NOTICE OF DOCKET ENTRY

DOCKET NUMBER

95 MISC 222901

Commonwealth of Massachusetts
Land Court
Department of the Trial Court

**cc:**


Kinscherf, Esq., Kendra Office of the Attorney General One Ashburton Place 18th Floor Boston MA 02108

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NOTICE ISSUED TO	COURT ADDRESS & PHONE NUMBER	
File Copy	Land Court Three Pemberton Square Room 507 Boston, MA 02108 (617)788-7470	
<p>Notice is hereby given that the following docket entry has been made in the above captioned matter:</p> <p>Notice of Docket Entry: There being no opposition thereto, The Commonwealth's Motion To Reopen Discovery is ALLOWED. A new discovery deadline of September 8, 2023 is hereby established. A further status conference will be held at 9:00 a.m. on September 19, 2023.</p> <p>Email notice to: Attorney Jason B. Curtin; Attorney Vincent J. Pisegna; Attorney Kendra Kinscherf; Attorney John Dupuis; Attorney Amy E, Kwesell; and Attorney Robin Stein.</p> <p>Judge: Roberts, Hon. Jennifer S.D.</p>		
DATE ISSUED: 03/08/2023	RECORDER: Deborah J. Patterson	

NOTICE OF DOCKET ENTRY

DOCKET NUMBER

95 MISC 222901

Commonwealth of Massachusetts
Land Court
Department of the Trial Court

**cc:**

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DATE ISSUED: 03/08/2023

RECORDER: Deborah J. Patterson

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Exhibits: See Index

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

LAWRENCE SUPERIOR COURT
STATUS CONFERENCE

NAHANT PRESERVATION TRUST, ET AL,
Plaintiffs

v.

DOCKET NO. 1977CV01211

NORTHEASTERN UNIVERSITY,
Defendant

NORTHEASTERN UNIVERSITY,
Plaintiff

v.

DOCKET NO. 2177CV00186

NAHANT PRESERVATION TRUST, ET AL,
Defendants

BEFORE: THE HONORABLE JEFFREY KARP
May 20, 2022

APPEARANCES:

Counsel for the Town of Nahant:

GEORGE X. PUCCI, ESQ.
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Audio Recording Produced by FTR
Transcript produced by Approved Court Transcriber Jill Kourafas
REPORTERS, Inc. - 617-786-7783

1 APPEARANCES (CONTINUED) :

2 Counsels for Nahant Preservation Trust and
3 27 Citizens (Public Dedication Article 7) :

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7 Boston, Massachusetts 02109
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(No witness called.)

E X H I B I T S

NO.	DESCRIPTION	ADMITTED
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(No exhibits marked.)

P R O C E E D I N G S

(Case commenced at 8:57 a.m.

THE COURT OFFICER: We are on the record.

Court, all rise. Court's in session, you may be seated.

THE CLERK: Your Honor, we're on the record. May I call the case?

THE COURT: Yes, please.

THE CLERK: Thank you.

Calling Civil Action No. 1977CV1211, Nahant Preservation Trust, Inc, Town of Nahant versus Northeastern University consolidated with Case No. 2177CV186, Northeastern University versus Nahant Preservation Trust, Inc, Town of Nahant.

Would counsel please introduce yourselves starting with plaintiff?

MR. LURIE: David Lurie for the Nahant Preservation Trust and 27 residents of Nahant.

THE COURT: Okay. Good morning, Mr. Lurie.

MR. RACER: Good morning, your Honor. Harley Racer for Nahant Preservation Trust and the citizens.

THE COURT: Good morning, Mr. Racer.

MR. PUCCI: And good morning, your Honor. I'm back at --

THE COURT: Okay.

MR. PUCCI: -- defendant's, but --

THE COURT: -- that's --

1 MR. PUCCI: -- I'm a plaintiff as well for the Town of
2 Nahant, George Pucci.

3 THE COURT: Okay. Good morning, Mr. Pucci.

4 MR. O'FLAHERTY: Good morning, your Honor, Kevin O'Flaherty
5 and John White, my colleague for Northeastern University.

6 THE COURT: Okay. Good morning, Mr. O'Flaherty and
7 Mr. White.

8 So, folks, I appreciate your flexibility with scheduling.
9 So I do -- we do have a hard stop at 10:30.

10 This is an important issue for everyone, so if we run out of
11 time, we'll -- I'm hoping that we can get through it. If we run
12 out of time, we'll have to figure out another date to continue
13 the hearing. I have a jury coming in at 10:30.

14 So, let me just tell you, I've -- I've read all of the
15 submissions. I've read the entire record. I have read all of
16 the cases cited by both sides, except the cases -- the non -- the
17 cases from other jurisdictions. I haven't read those yet.

18 So I'm really familiar with the law and the facts and the
19 allegations. So what I'd like to do is I have a bunch of
20 questions that will help me kind've frame some issues in my mind.
21 And then what we'll do is when we're done with the questioning --
22 my questions, we'll perhaps maybe split the time in half or see
23 where we're at.

24 So the first thing I'd like to do is just -- it's a
25 practical concern, but it's also -- I think it's also a

1 substantive concern.

2 So my understanding for -- well, the Land Court, when the
3 Land Court framed the first factual issue, right? I'm trying to
4 understand really what land exactly we're -- we're disputing.
5 What land, what portion of the land is actually the -- that the
6 plaintiffs actually -- well, I guess I can't say "plaintiffs,"
7 can I?

8 What specific land? What meets and bounds? What parcel
9 that the Town of Nahant and the Trust allege was dedicated, okay?
10 Because -- so it may be very simple.

11 There is this 12.1-acre parcel that the deed into -- into
12 Northeastern from '67, I think it was, 1967, identifies a
13 particular parcel as -- let me just see. Tract A and in
14 parentheses it says "(Parcel No. 2)," and then it sets forth
15 meets and bounds and then it says "Approximately 12.1 acres."

16 So, is that the land that the Trust and the Town allege was
17 dedicated?

18 MR. LURIE: We allege what was dedicated is runs from Murphy
19 Bunker, which is right here, the top of Murphy Bunker, along the
20 coast up to Lodge Park.

21 So this area right there. That's what Northeastern --

22 THE COURT: Okay.

23 MR. PUCCI: -- in words refer as to the northeast portion of
24 the site.

25 THE COURT: Please, move around anytime that you need.

1 So, can I ask then if -- if it's not -- so, have -- have --
2 has anyone determined the meets and bounds of the specific area
3 that is claimed to have been dedicated because I have to tell
4 you, here's my -- here's my global issue is I have a hard time
5 just knowing realistic law from a practical standpoint because I
6 practiced a little bit in this area with developers and the likes
7 -- the like.

8 It seems to me that it's -- it's -- that in order for there
9 to be a dedication, doesn't there need to be an identification of
10 the specific land?

11 So, otherwise, you know, otherwise, it's this amorphous, you
12 know, well, yeah, it's, you know, it's that hill over there and
13 this valley over here. So maybe it's simple. So have the meets
14 and bounds been determined or is there some way --

15 MR. LURIE: It's easily determinable in --

16 THE COURT: Okay.

17 MR. LURIE: -- in -- in the course of the taking in the 80A
18 case, you know, what's at issue is a conservation easement that
19 is larger than this area. But it has map meets and bounds of --
20 of a portion of this and we could easily determine that.

21 THE COURT: All right. But isn't this a problem for the
22 Town and the Trust case?

23 I mean, leaving aside -- you know, I'm going to -- I have a
24 lot of questions, but leaving aside the -- well, no, I can't
25 leave aside the intent, right?

1 I mean, doesn't there -- if there needs to be a clear and
2 unequivocal intent to dedicate, doesn't there need to be a clear
3 and unequivocal intent to dedicate meets and bounds or at least
4 some -- some parcel of land that can be identified even -- even
5 by way of, you know, it's this side of the street and that side
6 of the street and the stuff that's in between.

7 MR. LURIE: Yes.

8 THE COURT: Okay.

9 MR. LURIE: Yes, we do agree, and it is easily identifiable
10 because Northeastern's portion of the site -- if I may approach,
11 your Honor?

12 THE COURT: Sure.

13 MR. LURIE: -- is bounded by the coastline here, by Lodge
14 Park here and by Murphy Bunker. That is the area.

15 THE COURT: Okay. So we've got --

16 MR. LURIE: It's actually known as the "Northeast portion of
17 the site."

18 THE COURT: All right. So we know -- what you're saying is
19 the coastline, Lodge Park, and presumably -- obviously, Lodge
20 Park has meets and bounds so that you'd be able to identify the
21 perimeter of boundary.

22 And then what was the -- you said the Murphy Bunker.

23 MR. LURIE: Murphy Bunker.

24 THE COURT: But -- but I believe -- it's so I'm being -- the
25 Land Court framed it the land on top of and to the east of Murphy

1 Bunker. So does Murphy -- how does Murphy Bunker serve as a
2 delineation point?

3 MR. LURIE: Because Murphy Bunker roughly runs north and
4 south. So this is flipped. So this is to the east.

5 THE COURT: Okay. So -- and you are talking about -- you
6 are claiming the land, apparently the land that's grown above the
7 bunker, correct?

8 MR. LURIE: Yes.

9 THE COURT: So you're claiming that as part of the parcel,
10 right?

11 MR. LURIE: Yes.

12 THE COURT: Okay. All right. So let me just see here. Go
13 back to my notes.

14 All right. So the Town and the Trust allege that the
15 purpose of the dedication is -- just globally is to serve as a
16 wildlife preserve and for pass of recreation, is that right,
17 Mr. Lurie?

18 MR. LURIE: Yes.

19 THE COURT: All right. And then there are plenty of
20 instances that the Town -- the Town parties, Nahant parties point
21 to instances in the summary judgment record where Northeastern
22 communicated to others and to GSA or to the Federal Government
23 that its land on East Point includes a wildlife preserve or would
24 include a wildlife preserve.

25 But it strikes me that not all wildlife preserves are

1 necessarily used for the public. So I wonder is there some
2 conflation going on; in other words -- and I was guilty of this
3 until I examined it closer, and that is that the simple framing
4 as -- the simple act of Northeastern referring to part of its
5 land as a wildlife preserve, leaving aside the pass of recreation
6 issue, the wildlife preserve doesn't mean -- doesn't mean to me
7 that there was an intent to dedicate for public use, right?
8 Because there are wildlife preserves that -- where landowners
9 don't give people the permission to use it because they're
10 preserved, right?

11 MR. LURIE: Well, I think you correctly identified that
12 there's two things going on, and one of them is that there's been
13 53 years of public use of the site whereby Northeastern stood by
14 and allowed the public to use the site in so many different ways.
15 And that conduct under *Smith*, we say is sufficient by itself to
16 show dedication to public use.

17 *Smith* also teaches that other conduct and other statements
18 can be used to show dedication, and that includes the treatment
19 of the -- of the site as a preserve, that it wasn't developed at
20 all ever, that it was represented to the public, to the
21 governments as a wildlife preserve. It was stated that way
22 repeatedly. It was used that way --

23 THE COURT: I agree.

24 MR. LURIE: -- by the public and it was --

25 THE COURT: I --

1 MR. LURIE: -- never -- excuse me, your Honor -- but it was
2 never said to be private, it was never said to be temporary, it
3 was never said to be only for the purpose of protecting the
4 coastline.

5 All of these limitations that Northeastern now wants to
6 impose upon that, they never were expressed.

7 THE COURT: But, again, so I think you're missing my point
8 or maybe -- the point is, is that just because it's called
9 "referred to by Northeastern as a wildlife preserve," you're
10 saying all the things that Northeastern didn't do. But it also
11 didn't public -- it didn't declare it for public use, it didn't
12 -- it apparently had -- and I know that there's issues of fact
13 related to the no-trespass signs or whatever, but leaving that
14 aside, but -- but the point is, is that the things that you say
15 that -- leaving aside the long history of use which is, we'll get
16 to, those things that you just rattled off -- I think there were
17 three of them -- that Northeastern didn't do, I don't think that
18 Northeastern is required to do those things under the caselaw. I
19 think that you're required to prove that Northeastern clearly and
20 unequivocally dedicated it for public use.

21 So you're required to prove the inverse that Northeastern
22 actually said, "Hey, public, you know, use this wildlife
23 preserve."

24 My point -- my narrow point on this and it may be semantics,
25 but I think it's important semantics is that as an example one of

1 -- one of the six -- I count them six bases that will -- that the
2 Town points to in the summary judgment record to show this intent
3 to dedicate which one of the big ones being the 50-plus years of
4 use.

5 One of them is the 19 -- April 1965 proposal, right?

6 MR. LURIE: Yes.

7 THE COURT: And it says, you know, that in one sentence in
8 that -- I think it's 11 pages or so -- that Northeastern was
9 telling the Federal Government that it sought to acquire the
10 whole of East Point to make it a wildlife preserve.

11 So that may be some evidence of something, but what I'm
12 getting at is that doesn't convince me of really anything in a
13 vacuum because -- or really anything at all because a wildlife --
14 the term of art being used as a wildlife preserve doesn't then
15 imply that it's for public use.

16 MR. LURIE: I understand, your Honor. What it implies is
17 preservation which had actually occurred here, no development.
18 It implied it was for the purpose of wildlife which included not
19 just the littoral and benthic qualities that are mentioned in
20 that proposal, but also the uplands and the migratory birds that
21 came to be seen here by -- by the public.

22 And the proposal that you're referring to, it was repeated
23 over time. So it was maintained as a wildlife preserve. The
24 public used it as a wildlife preserve. It used it as for pass of
25 recreation. It used it for migratory bird watching.

1 So that is the fact that Northeastern publicly stated and
2 the Town relied upon it being a wildlife preserve is that it's
3 open space. And it was also open to the public.

4 Northeastern stood by and encouraged the public to use it for
5 pass of recreation because it wasn't developed. It became a
6 public park. 53 years of use of a public park that was preserved
7 from development.

8 THE COURT: Do you have to show an active dedication? In
9 other words, this is the date, this is the mechanism, this is the
10 statement by the president of Northeastern, this is something in
11 a deed, this is something in a document because -- so I've read
12 all the cases.

13 I agree with you. You know, let's be frank. A vast portion
14 of your argument is really dependent on this 50-year history of
15 use. And I -- and I get that the caselaw says, at least the
16 public use caselaw which has been subsumed into the dedication
17 caselaw says that that's an important factor. But that can't be
18 the only factor, right, because the SJC said in that -- in the
19 *Smith* case that -- actually, it may have been the Mahajal
20 [phonetic] case -- that, you know, this is -- these are my words,
21 obviously -- this is a huge deal for someone to say "I'm taking
22 my land and I'm dedicating it letting the public use it," right.

23 So that's why it has to be clear and unequivocal. It's not
24 like -- it's not like adverse possession where a lot of times
25 it's some right-of-way or something. But this is like the

1 dedication of the whole parcel of land.

2 So, doesn't there need to be something, some act of
3 dedication?

4 MR. LURIE: There does not. And that's what *Smith* teaches.
5 *Smith* says that the test is the totality of circumstances. You
6 can show that by statements to the public; you can show that by
7 statements to people with whom Northeastern dealt, including the
8 Town and the public back in 1965; you can use -- you can use the
9 conduct of Northeastern and public use while Northeastern stood
10 by and allowed that and encouraged that.

11 That's what *Hayden* teaches. *Hayden* says "Public use -- if
12 an owner stands by while the public uses their property," that is
13 very strong evidence of intent to dedicate.

14 So it is our burden to show an intent to dedicate. You can
15 use -- we can prove it with all of these -- this evidence, but on
16 summary judgment, your Honor, there's disputed issues of fact and
17 inferences have to be drawn in our favor.

18 We cited caselaw showing that -- that under a long line of
19 cases in Massachusetts that this history of use with the owner
20 standing by creates a presumption of dedication.

21 THE COURT: You know, I have to tell you, Mr. Lurie, I've
22 read those cases and I'm not seeing a presumption.

23 I do agree that it's a very important factor, but I don't
24 know, I -- you could point me to a particular portion of a case
25 that would stand for this presumption.

1 Presumption's a pretty strong word and that's not semantics,
2 that's important because, yes, I'm looking at the evidence in the
3 light most favorable to you folks, but where does the presumption
4 come from? Where specifically do I find a presumption in the
5 caselaw?

6 MR. LURIE: *Smith* says that they're -- the SJC didn't need
7 to reach the issue of whether 60 years of use alone showed an
8 intent to dedicate because they found that the application for
9 the state grant was the clincher.

10 Here there's enough evidence of use alone for 53 years with
11 Northeastern allowing it to create an issue of fact from which a
12 reasonable jury could find a dedication.

13 But that's not all. There's more. There is a consistent
14 pattern of -- of conduct treating it as a wildlife preserve.
15 There are statements made to the public back in 1965 upon which
16 the Conservation Commission relied that the Northeastern would
17 provide access to the ocean and the cliffs.

18 And importantly, your Honor --

19 THE COURT: By where does the presumption come from?

20 MR. LURIE: I'm sorry?

21 THE COURT: Where does the presumption come from? You folks
22 have repeatedly used the word "presumption," and I think it's an
23 overstatement. I don't think that the law makes any presumption
24 at all. It says it's an important factor, but "presumption" is
25 strong because really what you're saying is, you're saying "Look,

1 because it's summary judgment this presumption alone means you
2 need to deny the motion, and I'm not finding a presumption. So
3 show me where the presumption is.

4 MR. LURIE: I agree, your Honor, that the cases that we
5 cited that refer to 20 years of use or 40 years of use as
6 creating a presumption do not indicate how that is to play out in
7 a dedication case. Is it a bursting presumption? Does it fall
8 away once other evidence is -- is presented?

9 But I think that we're not resting our case on the fact that
10 that, you know, that alone would create reasonable inferences or
11 that a reasonable jury could draw to deny summary judgment.
12 There is 53 years of use. That is a strong fact, according to
13 *Hayden*, that by itself would allow a jury to infer that
14 Northeastern had dedicated this land.

15 It was treated as a public park for 53 years. Northeastern
16 represented to the public in 1965 that they would have access to
17 the -- to the cliffs and to see the ocean, and that's why they
18 allowed them to -- to actually use the property for 53 years.

19 THE COURT: All right. So let me just ask -- so, as I said,
20 I count basically six factors, that -- that six items in the
21 summary judgment record are six factors that the Town parties
22 point to to show this intent to dedicate.

23 So we've talked about the April of 1965 proposal. As for
24 the May 1965 letter from Northeastern to GSA, the Government
25 Services Office, which is Exhibit 19.

1 Mr. Lurie and Mr. Racer, what exactly in that letter is
2 evidence of an intent to dedicate? Like I get your argument on
3 the proposal, you're pointing to the wildlife preserve, but what
4 should I be looking at in Exhibit 19?

5 MR. LURIE: You're referring to the May 17, 1965 letter,
6 your Honor?

7 THE COURT: Yes.

8 MR. LURIE: Here's a small chalk letter. So before I talk
9 about the language in it, I want to go over briefly what preceded
10 this letter.

11 THE COURT: Can I -- can I just interrupt for one moment?
12 And I'm sorry, Mr. Lurie, I realize I drive -- it used to drive
13 me crazy as a lawyer having a judge that's interrupting, but so
14 -- and I apologize. This doesn't make my interruptions right.

15 I spent a lot of time because I knew nothing about
16 dedication. I didn't even know there was an Article 97 till you
17 folks first appeared before me.

18 So I spent a lot of time, the staff, our research attorneys
19 spent a lot of time in the record and the caselaw and all that.

20 And I want to say to Mr. O'Flaherty and Mr. White, is that
21 -- well, I'll say it to everyone that -- this may be somewhat
22 obvious. I'm skeptical.

23 So I went into this endeavor thinking when I took my first
24 pass through everything, read through everything, I said, "You
25 know" -- to myself -- "you know, there's issues of fact here.

1 You have to take the evidence in the light most favorable to the
2 Town litigants, there's issues of fact, there's this wildlife
3 preserve" and, you know, it kinda struck me as, again, as an
4 adverse possession-type of it -- it's, you know, an instance
5 where you have to go back and look at, you know, what happened
6 over 20 years in this case, 50 years.

7 But then when I pass -- read it a second time, looked closer
8 at the -- at the caselaw, I'm really -- I'm really of the font
9 right now that the Town litigants will not be able to prove an
10 element of their claim, a significant element of their claim
11 being the clear and unequivocal dedication.

12 So the reason why -- I guess really the reason why I'm
13 interrupting and asking questions and I haven't even let the
14 moving party speak yet is because that -- my questions that I
15 wrote down are all with that frame of mind.

16 I'm, you know, I'm just having trouble seeing other than
17 this history of use, all right, which, you know, we'll get to
18 that in a minute. You know, I don't know if Northeastern
19 concedes. I know -- actually, I know that probably Northeastern
20 doesn't concede, but it seems to me that there's plenty of record
21 evidence of long use, long history of the public using the land
22 for, you know, various pass of recreation, but, you know, I think
23 that that's the only thing in the light most favorable to the --
24 to the Town folks of the six factors that really has weight and
25 it's -- I don't just see -- I don't see that as enough.

1 MR. LURIE: Let me take it piece of piece, your Honor --

2 THE COURT: Sure.

3 MR. LURIE: -- if I may.

4 So one of the statements that you mentioned that we do rely
5 upon is this letter --

6 THE COURT: Sure.

7 MR. LURIE: -- back in 1965 where the president of
8 Northeastern --

9 THE COURT: What page are you on just so I have it? Is that
10 the second page?

11 MR. LURIE: That's the second page.

12 THE COURT: Okay.

13 MR. LURIE: And the question, your Honor, is why did
14 Northeastern allow the public to use the land for 53 years? Why
15 did they welcome them? Was it just being a good neighbor? Was
16 it just for the sake of community relations? Why did they
17 encourage people to use the land, including the building of a Boy
18 Scout trail up to the top of Murphy Bunker, including doing an
19 audio tooler [phonetic] in conjunction with the Town?

20 It all stems from 1965 when they acquired the land. How did
21 they acquire the land? They needed the Town's support to acquire
22 the land.

23 So when the Town delegated to the Conservation Commission,
24 the authority in 1965, to seek from the Federal Government access
25 to the coastline in the way that that had been historically

1 available, Ruth Alexander wrote a letter dated
2 April 30th, 1965, the Chairman of the Conservation Commission,
3 where she asked: "Insofar as conservation aspects are concerned,
4 namely, preservation of the unusual beauty of the striking bit of
5 unspoiled cliff coastline, we are of the opinion that's in the
6 interest of the Town to have the property pass through an
7 educational institution, such as Northeastern University,
8 particularly if they were reserved to the townspeople the right
9 to walk along a pathway of the coastal edge, and if some
10 assurance is given that only low lying or otherwise inconspicuous
11 buildings are contemplated."

12 Now, in response to this letter --

13 THE COURT: Is that Exhibit 18?

14 MR. RACER: Yes.

15 MR. LURIE: Yes.

16 THE COURT: Okay.

17 MR. LURIE: In response to that letter on May 4th, the GSA
18 writes to the Town -- and that, your Honor, is Exhibit 45 in the
19 record at Page 678 -- and it says to the Town: "Do you really --
20 do you really under -- we're going to consider this, you know,
21 we've got this letter from the Conservation Commission supporting
22 Northeastern. Do you want to reconsider and actually acquire the
23 land for yourself?"

24 Then there's a meeting in May where President Noelle meets
25 the Town Representatives, and they work out a deal, and the

1 Conservation Commission, Ruth Alexander, ends up supporting the
2 Town and its acquisition of the land.

3 Why did she support it? Because he says in his May 17th,
4 1965 letter: "We further assured them that we would work for the
5 Town in the development of a walkway through the property which
6 could be used by the citizens and others to view the ocean and
7 the cliffs. And this way the Town could still have the benefit
8 of the beauty of the area, and Northeastern would have the
9 benefit from a utilitarian standpoint."

10 THE COURT: Okay. So let's say that -- doesn't that give --
11 doesn't that at most give perhaps evidence of an intent to
12 dedicate a walkway not 12 acres or whatever?

13 MR. LURIE: It's evidence of an intent to give public
14 access. Northeastern then gave public access. They gave it for
15 53 years and they give it over the entire site.

16 And from that -- and, by the way, your Honor, after this
17 letter, they had a dedication ceremony two years later, and they
18 gave the Conservation Commission a plaque supporting -- for
19 supporting their acquisition of the property.

20 Why did they do that? Because they needed the Conservation
21 Commission. They gave assurances to the public that the public
22 would have access.

23 A jury could infer, a reasonable jury could infer that the
24 reason why Northeastern gave the public access for 53 years,
25 throughout the whole site, was because of these various

1 assurances.

2 Did they build it into an easement and the deed? No. Did
3 they issue them a license or a revocable license? No. But did
4 they give them assurances? Absolutely.

5 And we submitted the deposition of Mr. Trussell where his
6 position was assurances are meaningless. It doesn't matter. Oh,
7 yes, assurances were given orally, assurances were given in
8 writing. But, no, we didn't actually give you access to the land
9 and assurances because they didn't make their way into a contract
10 are meaningless.

11 Well, that's not the case in dedication law. That is an
12 example of one sort of conduct that Smith blesses as being
13 evidence of an intent to dedicate. Assurance is given to the
14 people with whom you deal on which they rely.

15 THE COURT: All right. Thanks. You've answered my
16 questions.

17 Let me ask -- I'm going to move on to the moving party,
18 Northeastern. But let me just before you get into your
19 presentation, let me just ask a question.

20 Does Northeastern agree that some amount of public use went
21 on for a long time or for a period of time; in other words, how
22 much public use does Northeastern concede? Because -- let me say
23 this: Starting with what I just said a few moments ago is that
24 I'm not convinced that the long history of uses are enough to
25 overcome summary judgment.

1 But I'm just -- I'm having trouble understanding from the
2 record what Northeastern concedes for use.

3 MR. O'FLAHERTY: A few things need to be clear.

4 THE COURT: Sure.

5 MR. O'FLAHERTY: One is that there has always been, since
6 the date Northeastern acquired the property on February 23rd,
7 1966 by deed, there has always been an easement across our
8 property up to the Lodge Park area when it eventually became
9 Lodge Park.

10 At that time in 1966 that eight-acre, 8.3 acre-site was
11 still owned by the United States Government. It was eventually
12 developed or it had been developed into a nuke missile site.
13 They kept it for a while and they needed access because it's
14 landlocked.

15 And so, in our deed from the USA to Northeastern, there's a
16 20-foot wide easement that goes up to that park. And that was
17 always used by the public and anybody else because it was an
18 easement that eventually became the Town's easement when it
19 acquired in the 1970s Lodge Park.

20 But as for the use of the rest of the property, the record
21 is very clear, your Honor, that from the very start, Northeastern
22 attempted to keep that site secure.

23 We have records of -- of in -- in the summary judgment
24 record, there is a -- a caretaker was hired immediately to
25 provide security at the site, the affidavits of Mr. Bradley and

1 Mr. Ward, two human beings, who are actually eye witnesses to
2 this, Mr. Bradley being part of the Conservation Commission group
3 that negotiated with Northeastern to get them interested in
4 taking the property says that Northeastern kept security at the
5 site from the start, and while people could go up and down the
6 easement, there were no trespassing signs and the like all over
7 the property to keep people on the easement and not in the other
8 areas because those were the areas where science was going on,
9 the benthic, littoral areas up at the seashore. And Northeastern
10 didn't want folks disturbing those areas. So they kept them with
11 security and with no trespassing.

12 The fact that people trespass, your Honor, does not a
13 dedication make. That is pretty clear.

14 So let me just say a word about use, your Honor, because you
15 asked the question.

16 THE COURT: Hold on one second, Mr. O'Flaherty.

17 So actually I just want to write.

18 So as for this right-of-way, this easement, right?

19 MR. O'FLAHERTY: Yes.

20 THE COURT: This is why I started my questions with "what
21 land are we talking about," right?

22 MR. O'FLAHERTY: Yes.

23 THE COURT: So I'm having trouble -- and I know you folks
24 will think to yourselves, "Well, you should've taken us up on the
25 view," right? But the right-of-way -- but I know -- so what I

1 found useful is there is an exhibit to the Trust complaint. It's
2 Exhibit 2. It's this aerial photo. It's got color, different
3 colors for different items. And I can see that Lodge Park has
4 essentially a road going up to it, it looks like, right? Is that
5 a road or is that just the path, a walking path?

6 MR. O'FLAHERTY: There's a paved access that goes up to
7 Lodge Park through the Northeastern property. That is the
8 easement we're talking about.

9 THE COURT: Okay. That's what I'm -- that's what --

10 MR. O'FLAHERTY: And then there's a loop around Lodge Park.
11 There's a walking loop around there that looks like an oval on
12 the flat landscape of Lodge Park.

13 THE COURT: Okay. So -- all right. So I guess then I'm
14 then having trouble --

15 MR. O'FLAHERTY: It's hard to see that easement on that
16 aerial, your Honor.

17 THE COURT: Yeah. Could I have you -- have the counsel come
18 up just to -- just so we have this all in front of us?

19 And I'm referring, just for the record, again, I believe
20 this is Exhibit 2 to the Trust complaint in the Superior Court
21 action.

22 So what I attempted to do -- you can see my pencil marks
23 there. So it's fair to say that -- and, by the way, I'm not --
24 I'm not looking at this to get precise meets and bounds even
25 though I asked about that. I'm trying to get -- understand

1 globally what I could have gleaned from a view perhaps.

2 All right. So this green area is Lodge Park?

3 MR. O'FLAHERTY: Yes.

4 THE COURT: All right. We have this road -- it's something
5 I shouldn't call it a road. We have something that looks like it
6 grants access because this is a road.

7 MR. O'FLAHERTY: Yes.

8 THE COURT: So, yeah -- is that -- is that --

9 MR. O'FLAHERTY: It comes in like this, your Honor.

10 THE COURT: Yeah.

11 MR. O'FLAHERTY: Down here is Nahant Road.

12 THE COURT: Yeah.

13 MR. O'FLAHERTY: It comes in like this. It goes up here,
14 goes in what I would call the front of Murphy Bunker right along
15 here, and then it loops around like that.

16 THE COURT: Okay.

17 MR. O'FLAHERTY: That is the -- that is the easement.

18 THE COURT: Okay.

19 MR. LURIE: It was moved at one point.

20 THE COURT: Okay. All right --

21 MR. LURIE: Your Honor?

22 THE COURT: No, go ahead.

23 MR. LURIE: They've moved it at one point. So this is
24 actually not really evidentiarily [sic] correct because there's a
25 designated easement area that is a matter of record which is

1 different than what is being used as the easement area now.

2 THE COURT: Okay.

3 MR. LURIE: It was moved at one point.

4 MR. O'FLAHERTY: To be perfectly clear, the deed allows
5 Northeastern the unilateral right to move the easement. Now,
6 whether it was moved or not, I don't know, but that's the way it
7 runs now.

8 THE COURT: All right. So my question about the easement is
9 this: Does the easement go through the land that the Trust
10 claims was dedicated?

11 MR. LURIE: No. It abuts it.

12 THE COURT: Abuts it, okay.

13 Does Northeastern agree that that's the case? You do agree.

14 MR. O'FLAHERTY: I do. I think the alleged dedication,
15 counsel can agree or not agree, is more or less this red
16 triangle.

17 MR. LURIE: I agree.

18 MR. O'FLAHERTY: That's more or less what the -- what the --
19 what the Town and MBT say was dedicated, that rough area.

20 THE COURT: Okay. And that's what I thought, but you had
21 said that the boundary was the coastline, is that because you're
22 taking into --

23 MR. LURIE: This is the coastline.

24 THE COURT: Oh, there's coast up here.

25 MR. LURIE: This is Lodge Park and this is the Murphy

1 Bunker.

2 MR. O'FLAHERTY: Close encounters.

3 THE COURT: All right. Thanks so much, I appreciate it.

4 MR. LURIE: Sure.

5 THE COURT: So just for purposes or the record, so this red
6 triangle-ish portion is roughly what the Town litigants claim has
7 been dedicated. All right.

8 MR. O'FLAHERTY: Yes.

9 THE COURT: So -- so here --

10 MR. O'FLAHERTY: Your Honor, if I may? Just -- I'm sorry.

11 THE COURT: Sure. No, go ahead.

12 MR. O'FLAHERTY: I just want to get to the meat.

13 THE COURT: Sure.

14 MR. O'FLAHERTY: Because today really is the heart of
15 everything. I agree with your Honor.

16 And the question is: Was there a dedication? We know with
17 absolute certainty, with a hundred percent apodeictic certainty
18 there wasn't. How do we know that? Because the Town itself
19 didn't want there to be public access to their site.

20 In 1965 when this was going back and forth between the Town,
21 Northeastern and the Federal Government, what happened was in the
22 record and it's shown in the minutes that were kept in 1964 of
23 the Town Meeting, there was a debate in Nahant. And the debate
24 was between people like Ruth Alexander and Larry Bradley, who's
25 given an affidavit, and Charley Kelley who was the then Board of

1 Selectmen Chair. And the debate was this, this land is open. We
2 have first dibs on this land. The Government first went to
3 Nahant and said, "Do you want this?" And they debated that for a
4 couple of years.

5 Finally, in '64, it came up to Town Meeting and Town Meeting
6 said this: "We do not want to take the land as a public park,"
7 because then we'd have to open it to people and this was Ruth
8 Alexander's quote in the Town Meeting Minutes: "We do not want
9 it to be open to people from Somerville, Boston, Chelsea,
10 Medford, Malden, wherever" --

11 THE COURT: Wait, wait. She -- Malden was part of that
12 because I've welcome all the -- should I take offense with that?

13 MR. O'FLAHERTY: She said -- her exact words were "Boston,
14 Somerville, Chelsea," et cetera. So I would fall onto the et
15 cetera, too.

16 THE COURT: All right. All right.

17 MR. O'FLAHERTY: However, here's the point, your Honor.
18 Here's the point. They didn't want this site open to the public.
19 Guess what a dedication would do? It would open it to the
20 public.

21 So they didn't want that. Charlie Kelley, the then Board of
22 Selectmen Chair says "Well, let's send it to private developers
23 so they can develop expensive-type estate properties up there and
24 get this property back on the tax rules. They didn't want that.

25 So Ruth Alexander, Larry Bradley, John Lowell, those people

1 decided "Let's get a university or college involved. We'll get
2 it to them and they'll buffer us from public openness to
3 everybody which we don't want, and then would've been what a
4 dedication would have given, and we don't want private
5 development. Let's find a knight in shining armor here.

6 And Northeastern rode to the rescue in 1965, '66 and they
7 became the buffer to those two extremes that the Town didn't
8 want.

9 But here's -- here's my point, your Honor. The Town clearly
10 did not want or accept it. There was no dedication ever made.
11 There was no unequivocal, deliberate, clear statement that
12 Northeastern wanted to dedicate that triangle of land on top of
13 the Murphy Bumper -- Bunker and to the east to anybody.

14 And the Town didn't want that. And that's clear in the
15 Town's own records where at the end of the -- of the 1965 year,
16 they have -- and it's in the record -- they have a Town annual
17 report. And in that Town annual report in December --

18 THE COURT: That was what year?

19 MR. O'FLAHERTY: 1965.

20 So after the May letter that we've talked about and after
21 the April '65 proposal in December of 1965, so months after that,
22 the Town Meeting or -- excuse me -- the Town of Nahant publishes
23 an annual report.

24 And what they say in that annual report is completely
25 contradictory to what Mr. Lurie just said. In that annual report

1 they say -- the Conservation Commission says "You know, we tried
2 -- Northeastern is going to take this property in February. We
3 tried to get Northeastern to agree to give us this two- to
4 three-foot walking path through it. They wouldn't do it. We had
5 no assurances. We have hope that maybe if Northeastern comes in
6 there, that they'll do something for us, but we didn't get it.

7 And, by the way, your Honor, they did not want a dedication
8 because that would throw the property open to the world. And
9 that was something they clearly didn't want.

10 So there was no dedication. There wasn't even a promise, an
11 assurance because they say it right there in their own report
12 months after all this stuff was going on that they didn't get it.

13 If they had gotten an assurance for the walking path or even
14 worse if they had gotten the dedication they didn't want, that
15 would have been front page news, headline news in that 1965 Town
16 Annual Report and it's just the opposite.

17 So there -- my point in this, your Honor, where you started
18 was exactly right. In order for there to be a dedication,
19 there's got to be a clear, unequivocal, deliberate statement or
20 act.

21 These plaintiffs, the Town and MPT point to these letters.
22 And as your Honor noted, these letters and this proposal, there's
23 nothing in that proposal that says "Northeastern was dedicating
24 to the public half of the land it had yet to acquire." What
25 sense would that make?

1 And it wasn't -- it wasn't the case that Northeastern needed
2 the Town because the Town already realized that Northeastern
3 wasn't dedicating anything. The Town didn't want that. And they
4 weren't giving them a path.

5 The Town didn't withdraw its support of Northeastern. Why
6 not? Because Northeastern was riding to the rescue of not
7 allowing private development and not allowing the site to be open
8 to the general public.

9 The people on the Conservation Commission, Ruth Alexander
10 and the others, realized that if they could get a university or a
11 college in there that was a much better situation for the Town
12 than either of those two things which they didn't want.

13 THE COURT: But I think -- I think the Town and the Trust's
14 point is that let's move past 1965, let's move past 1966, '67 and
15 look at what Northeastern allowed happened.

16 MR. O'FLAHERTY: Let me --

17 THE COURT: And, you know, we -- we -- the folks -- the
18 public, even people from Malden, tramps-- tramped all over this
19 land --

20 MR. O'FLAHERTY: We don't know about that, your Honor.

21 THE COURT: And -- and Maldenians love nature, by the way,
22 at least this one does.

23 MR. O'FLAHERTY: So do we.

24 THE COURT: But seriously over -- overtime, you know, this
25 shows -- so, in other words, there may have been -- there may

1 have been somebody on the ComCom, there may have been folks that
2 were in the government, Nahant government back in '65 that were
3 more conservative and didn't want outsiders.

4 But look what happened as the freewheeling '70s came about
5 and the '80s and the '90s, and you get all these years of use.
6 And so that's why I was interested about this right-of-way
7 because it seems to me -- and Mr. Lurie will address this when we
8 turn to him -- is that, you know, are we talking about the
9 public? When the public is saying that they're using, you know,
10 the land to, you know, whatever, bird watches or sunsets or
11 whatever, if they're using the right-of-way, even if the
12 right-of-way goes through the dedicated land, you know, how is
13 that evidence of a dedication really? So --

14 MR. O'FLAHERTY: It isn't, your Honor. And I would say that
15 there's been conflation in -- in the testimony. It's not really
16 clear in the affidavits, in all of them, some of them more clear,
17 that -- that where these people are when they're saying they're
18 watching birds or watching stars or whatever, they could be just
19 as your Honor says, you know, on the easement or even at the
20 Lodge Park, for example, which is not our land.

21 Here's the point, though, your Honor, this is the point on
22 -- on the use. If you read *Hayden*, the *Hayden* case, the *Hayden v*
23 *Stone* case, which is an old case, but it's a case that Judge Gans
24 discusses in *Smith* a bit. It's very clear that -- there's two
25 elements to dedication. There's the dedication and then there's

1 an acceptance. And they both have to be there. And you can't
2 accept what's never been dedicated. Point one for us. There was
3 no -- there was never any dedication.

4 So whatever use people made, it doesn't -- it doesn't rise
5 to the level of an acceptance unless there's dedication. They
6 can't point to clear, unequivocal dedication in this case. It
7 doesn't exist.

8 But as to acceptance, the *Hayden* case says "Mere use is not
9 acceptance. The use by the public is not acceptance."

10 Acceptance -- it can be evidence of acceptance. But acceptance
11 has to be from the authority to whom the property was dedicated.
12 And in *Hayden* that was a town because what was at issue there was
13 whether a way was dedicated to the Town as a way of the Town.

14 But in this case, the MPT parties and the Town are saying
15 this is Article 97 land. That is land dedicated not to the Town,
16 to the Commonwealth, to the Commonwealth.

17 So that's the governmental entity that would have to
18 indicate acceptance. That is totally absent here. The
19 Commonwealth has known about this case since July 23rd, 2019 when
20 Mr. Lurie sent Ralph Martin, the GC -- the then GC of
21 Northeastern, a letter that said, "We're going to sue you and
22 we're going to allege that there was a dedication." The
23 Commonwealth was copied more, Healey was copied on that, other
24 agencies of the Commonwealth. The Commonwealth did not intervene
25 in this case to assert "Yes, that is our land. That was

1 dedicated to us." But Article 97 land, let's be clear, that's
2 not the Town's land, that's the land of the Commonwealth.

3 And, by the way, again, the Town didn't want it to be
4 dedicated land because they didn't want everybody, even
5 Maldenians coming into that property. They wanted to keep it for
6 Nahant people. And when they negotiated with Northeastern what
7 they were negotiating was a two- to three-foot wide path for
8 Nahant people only. That's all over the record.

9 So they didn't want a dedication. There was no dedication.
10 And there was never an acceptance by the Commonwealth. And when
11 you read *Hayden v Stone*, you'll see that is the critical issue.
12 Use can be some evidence. And, again, your Honor, I think the
13 use here that has been claimed is completely equivocal, looking
14 at birds. Well, I mean, people come by my backyard and look at
15 birds in my backyard. That doesn't mean my backyard is dedicated
16 land. And I have a DCR path that runs right next to my property.
17 If people are on that path and they look down at my yard and see
18 a bird or a deer or whatever, that's not my -- that's not my
19 intent to dedicate to the public that land.

20 Similarly, if people are out there trespassing or walking
21 around, and, you know, Northeastern, yes, it's an educational
22 institution. It invited thousands of people out there over the
23 years. It ran programs for kids in the summer. It had science
24 programs for elementary, junior high, high school kids. Yes, the
25 place had a lot of use by many, many people, but that's

1 consistent with Northeastern's educational purpose, and the use
2 that in 1965 and forever, it said it was going to make to that
3 property to use that 1965 proposal says "Northeastern wants this
4 property to use it to its fullest potential for its educational
5 uses. And those eleven pages go on quite a lot about all the
6 various educational programs that could happen there. And that's
7 what's been happening out there.

8 THE COURT: And that's what the Federal Government put in
9 the deed --

10 MR. O'FLAHERTY: Yes, your Honor.

11 THE COURT: -- educational purposes. But -- but so --

12 MR. O'FLAHERTY: One more thing they put in the deed which
13 is this: Northeastern cannot transfer any interest in that
14 property to anyone. Had Northeastern made a dedication, they
15 would have been immediately in violation of the covenant in the
16 deed which said: "For the next 20 years, Northeastern will use
17 this for educational purposes only, and will not transfer an
18 encumbrance," like an easement, which is what these folks are
19 saying burdens the property. That would be a transfer.

20 And if there had been a dedication, your Honor, that would
21 have been reflected in the deed. It is not. They would have
22 been reflected a reference to the dedication and carved that out
23 from the 20.4 acres they were transferring to Northeastern, there
24 would have been a plan of how that desolate area in 1966 which
25 had been completely deluded by decades of military use was going

1 to be restored to some kind of Garden of Eden public wildlife
2 preserve. There was nothing like that in the deed. There was
3 nothing like that anywhere in the record back '66.

4 And, again, your Honor, I just -- I just want to emphasize I
5 know I'm trying your patience at this point.

6 THE COURT: No, no, you're trying my patience at all --

7 MR. O'FLAHERTY: I just want to emphasize --

8 THE COURT: I'm sorry that it --

9 MR. O'FLAHERTY: -- the Town did not want the public to have
10 access to that. That was clear in Miss Alexander, the person
11 they say was the spirit head of getting Northeastern involved in
12 this property. She clearly saw Northeastern as protection so
13 that the public would not be able to come out there nor would it
14 go into private hands for private development.

15 And that does not make a dedication either, your Honor, in
16 fact, it is evidence that there never was a dedication like the
17 1965, December the 31st, 1965 Town Annual Report says.

18 THE COURT: Let me just say this: I'm -- and I'll turn it
19 over to the other side in a moment, but on the acceptance
20 issue --

21 MR. O'FLAHERTY: Yes.

22 THE COURT: -- frankly, you know, I'm not convinced and it's
23 probably a double -- I think that there's genuine issues of fact
24 related to acceptance, at least, you know, again, I'll -- this
25 isn't my final decision by any means. But my view is that the

1 summary judgment record raises, you know, again, looking at the
2 evidence and in the light most favorable to the Townsfolks and
3 the Trust, raises issues of material fact related to acceptance.
4 But -- but -- but we don't get there if there's no clear and
5 unequivocal intent to dedicate. So --

6 MR. O'FLAHERTY: And the last thing, your Honor, is this is
7 registered land. That's why your Honor was designated as a Land
8 Court judge. And you cannot adversely possess registered land.
9 And no encumbrances are -- are on the property's title unless
10 they're shown on the certificate of registration.

11 There is no deed -- excuse me -- there is no incumbrance by
12 dedication shown on Northeastern's Land Court certificate and
13 nobody's put that in front of your Honor to say that I'm wrong
14 about that.

15 THE COURT: You know, can I say one thing? I thought about
16 the registered land aspect of it, and the fact that exactly what
17 you said, that you can't -- registered land can't be taken by
18 adverse possession. But -- but you're not saying that it can't
19 be taken by dedication, right, because I --

20 MR. O'FLAHERTY: I'm not saying it can't be. What I'm
21 saying is it isn't unless it's shown on the certificate of title;
22 in other words, the only encumbrances, and as we know under *Smith*
23 and other cases, when somebody makes a dedication, what the
24 public gets, what the public gets, not just the Townspeople, by
25 the public generally, what they get is an easement, is an

1 interest in the nature of an easement.

2 Well, if there's an easement over registered land, that
3 easement has to be shown on the certificate of title of
4 registered land and this isn't. That's because it doesn't exist.

5 THE COURT: Well, no, that -- I think that the argument
6 would be that there's no encumbrance on the certificate of title
7 because that's what we're doing now. We're in the Land Court and
8 we're seeking that and we haven't done so --

9 MR. O'FLAHERTY: Okay.

10 THE COURT: -- thus, but, in any event, I don't want to
11 speak for them, but --

12 MR. O'FLAHERTY: But the last point is in '77 when -- when
13 the Town went to the Land Court -- when they went to the Land
14 Court to say "Look, we now own Lodge Park so we should be shown
15 as the beneficiary of the access easement." They changed it and
16 they didn't at that time say "Oh, and also show a dedication
17 because that happened in '65, too, and we've been using it that
18 way." They didn't.

19 And at that same time -- we have a letter from -- from the
20 Town's Board of Selectmen Chair, Robert Steeves, that says "Since
21 the military's been out there, 1941, that area's been effectively
22 closed to the public.

23 We need some land up there at Lodge Park to have a park and
24 we haven't been able to go out there.

25 Another fact which shows there wasn't the kind of public use

1 going, you know, historically, maybe recently, there have been
2 people out there trying to show that they're using it. But
3 historically, as Steeves said in 1977, that area was closed
4 because the military is there and Northeastern was there.

5 THE COURT: All right. Let me turn it over to Mr. Lurie and
6 Mr. Pucci. Mr. Lurie.

7 MR. LURIE: Your Honor, several things. First, George is
8 just wrong on the -- on the law of acceptance. It's not only
9 issues of fact about acceptance, but the case that he cites for
10 the fact that use -- public use is not sufficient to -- to show
11 acceptance is -- is just -- that deals with acceptance of ways by
12 town, through municipal authorities. The caselaw is clear that
13 public use is sufficient for acceptance as well as strong
14 evidence of intent to dedicate.

15 The -- we put in seven affidavits, 22 interrogatory answers,
16 including from Clantha Sears, who's a hundred years old that
17 lived in Nahant in her entire life, from Mr. Mahoney who was born
18 in 1948 lived in Nahant his entire life attesting to the use of
19 this site.

20 There's no evidence of records of -- of trespass complaints
21 or ejectment of people of there, of letters to the public,
22 postings of any kind not permitting people there.

23 THE COURT: Can I ask so -- so when you say "attesting to
24 use of the site," that's why I was stuck on the meets and bounds
25 issue, right?

1 So it's not clear to me that -- well, let me back up. Let
2 me just ask it: How much land does -- do the Town and Trust
3 roughly allege was dedicated? So it's not the whole 12.1 acre
4 parcel that I picked out in -- from the -- that -- from the deed.
5 Again, I thought that that's what we were talking about, but...

6 MR. LURIE: It's roughly about five to six acres. It's the
7 top of the Murphy Bunker to the coastline to Lodge Park. It
8 includes this area, your Honor, the meadow. So the public has
9 actually used this site. They haven't just walked up Easement 2
10 and viewed it from the park. They've climbed up onto Murphy
11 Bunker. They've used the Boy Scout path. They've used the
12 trails that we put in evidence, too, that go -- that crisscross
13 the site.

14 They've gone into the meadow where migratory birds are.
15 It's not simply walking along an easement. They've actually been
16 on the site for 53 years with Northeastern's permission, an act
17 of encouragement, including using a public observatory that was
18 on the top of Murphy Bunker for some 20 years, climbing up and
19 down the Boy Scout path which went up from here onto the top of
20 Murphy Bunker with a rope swing up there, with clamoring there.

21 So it is not simply accurate to say that the public did not
22 use the site with Northeastern's permission, and it's not
23 accurate to say that they only accessed it by the easement.

24 THE COURT: Can I ask -- I don't remember. Is there a color
25 copy of that aerial photo and if not, maybe we should mark it

1 unless there's an objection as part of the record because it's
2 helpful to me to visualize? But I don't remember seeing that
3 particular photograph.

4 MR. LURIE: I'm not sure if this exact photo is in the
5 record.

6 THE COURT: Any objection, Mr. O'Flaherty --

7 MR. O'FLAHERTY: No, your Honor.

8 THE COURT: -- if we just add this to the summary judgment
9 record?

10 MR. O'FLAHERTY: No, not at all.

11 THE COURT: Okay.

12 MR. LURIE: But, your Honor, getting --

13 THE COURT: We'll -- we probably should mark it, but the
14 problem is that there's all these other exhibits. Just mark it
15 as A, Exhibit A.

16 MR. LURIE: Getting to the key issue of dedicatory intent,
17 Mr. O'Flaherty's argument about what happened in 1965, I think,
18 proves my point.

19 He's arguing an inference. He's arguing an inference about
20 what the Town did in its annual report, and that it essentially
21 conceded that Northeastern's assurances they would have access to
22 the ocean and the cliffs to enjoy the beauty of the area were
23 given up. That's an inference. It's contradicted by -- by 53
24 years of allowance of public use that happened afterwards. It's
25 contradicted by the letter from Northeastern's president that

1 preceded that that gave those vary assurances.

2 So you have these different events chronologically that are
3 sandwiched. The question is: Is there no reasonable inference
4 that can be drawn by a jury in this case to find dedication given
5 that conflicting evidence? We submit that there is. And that's
6 just one piece of the seven pieces of evidence that your Honor
7 referred to.

8 So let me briefly go to the other ones. As your Honor noted
9 there have been various public statements over the years that
10 this land is being maintained as a wildlife preserve. And let me
11 explain why that's important.

12 So, one of those is --

13 THE COURT: Is that part of an exhibit in the record? Just
14 so -- for my notes.

15 MR. LURIE: This has excerpts from things that are in the
16 record.

17 THE COURT: Okay.

18 MR. LURIE: The top is Northeastern's proposal --

19 THE COURT: Okay.

20 MR. LURIE: -- where it says "University seeks to buy up all
21 these points in order to make it a wildlife preserve."

22 But in the middle is an excerpt from the 1989 request for
23 proposals by the Nahant Conservation Commission which led them to
24 the creation of Lodge Park where it repeats that northeast
25 portion of the property and the rocky coast are maintained as a

1 wildlife sanctuary, ecological study area.

2 MR. O'FLAHERTY: Well, I object to that. Those are not
3 Northeastern's words. Those are the words of ComCom.

4 MR. LURIE: Well, I did not say that --

5 THE COURT: Well, there's no reason to object because it's
6 not even a state -- it's a statement of the ComCom, so I'm not
7 attributed to --

8 MR. O'FLAHERTY: I'm sorry.

9 MR. LURIE: And the reason why the statement of the ComCom
10 is relevant, your Honor, is because they were relying on
11 Northeastern's own statements and Northeastern's own actions in
12 creating this park that was contiguous to what they understood
13 was a wildlife sanctuary, a wildlife preserve and that it was
14 open space that was not going to be developed and that's why the
15 Town invested what it did in pursuing Lodge Park.

16 *Smith* teaches that public statements are evidence of
17 dedicatory intent. Northeastern had on its website for almost a
18 decade -- we submitted an affidavit that where our paralegal
19 searched the Wayback Machine to find over what period of time did
20 Northeastern tell the public that the Northeastern portion of the
21 property and the rocky coast are maintained as a wildlife
22 sanctuary and ecological study area. They did it for ten years
23 at least -- eight years, excuse me, from 1999 to 2007. That's
24 all we could find. It was probably on there longer than that.

25 Why is that relevant, your Honor? Because it shows that

1 this was being treated as open space. This was -- and the public
2 was using it as open space. They were using it for wildlife
3 viewing because migratory birds were there, and they were using
4 it for passive recreation, walking, walking on the trails,
5 climbing on the bunker, actively using it without any objection
6 from -- and actually with encouragement from Northeastern.

7 So when your Honor says "Well, the fact that it's being
8 mentioned as a wildlife sanctuary, why does that reflect
9 dedicatory intent?" Because it shows an intent to preserve it.
10 It shows that it's for wildlife purposes combined with
11 Northeastern's allowance of the public to use it for 53 years,
12 standing by while that happened actively encouraging it which
13 under *Hayden* is strong evidence of a dedicatory intent.

14 These are the sorts of things from which a reasonable jury
15 could infer that Northeastern intended to dedicate the property.

16 And as your Honor is well aware, such inferences are to be
17 drawn in our favor and your ruling on this summary judgment
18 motion, but that's -- that's not all, your Honor. The Town
19 actually treated this as part of its open space. Kevin, in his
20 papers, goes to great length to try to say that it actually
21 wasn't treated as such, but it was.

22 THE COURT: Wasn't treated as what, a wildlife sanctuary?

23 MR. LURIE: It was treated as open space and with public
24 access.

25 So, for example, your Honor, in 1989, the open space plan,

1 which is Exhibit 40, says that "Northeastern maintains much of
2 this land as undeveloped ecological study area and it identifies
3 Northeastern's property as education research and recreation with
4 "free public access." That's on page 397 of the open space plan
5 which is Exhibit 40.

6 Similarly in 2008 the open space plan which is Exhibit 4, it
7 identifies Northeastern's property as "free public access." And,
8 actually, I was referring to the 2000 and 2008 open space plan,
9 also the 1989 open space plan lists it in its open space
10 inventory. That's Exhibit 39 at Page 262. It's lists it as open
11 space on a map that's Page 264.

12 And then, you know, consistent with all of these treatments,
13 the Town in 1990 after it decides to pursue Lodge Park and issues
14 an RSP which confirms that the Northeastern portion of the
15 property is being treated as a wildlife sanctuary by
16 Northeastern.

17 The Town moves to protect it by amending its zoning
18 ordinance. It creates a new natural resource district
19 designation intended to preclude development. And it doesn't
20 just put Lodge Park into that area, it puts all of the
21 Northeastern's property into that area as well.

22 Now you will be dealing with that in detail, your Honor, in
23 the context of the Planning Board, Site Plan Approval case which
24 is also part of the six cases that are before you.

25 But I note that I here because it's part of the consistent

1 treatment by the Town in reliance on Northeastern's handling of
2 the property, treating it as open space, allowing the public to
3 use it, welcoming the public to use it.

4 That's why they proceeded to develop Lodge Park, that's why
5 they proceeded to amend their zoning ordinance and that's why
6 they were shocked 53 years later for Northeastern to say "Oh,
7 well, we're going to raise this whole area that has now grown up
8 and that they've treated as a wildlife preserve, we're going to
9 clearcut this meadow, the meadow that they, themselves, refer to
10 on their website as a thriving meadow. This is the meadow.
11 Thriving meadow with migratory birds. They have an audio --

12 THE COURT: So is the meadow -- does the Trust allege that
13 the meadow was part of the dedicated -- purported dedicated land?

14 MR. LURIE: Yes. Yes. Here's Murphy Bunker. Here's Lodge
15 Park. The ocean's up here. We allege that what's on top of
16 Murphy Bunker which is really forest and this meadow are part of
17 the dedicated Northeastern portion of the site.

18 Now -- now --

19 MR. RACER: Your Honor, Mr. Lurie, if I could just interrupt
20 for a moment. The aerial photo is in the record. It's Exhibit
21 53.

22 THE COURT: Oh, it is. Okay.

23 MR. RACER: There's four photographs on Exhibit 53 and the
24 first one is that aerial photo and the second one is -- the third
25 one is the thriving meadow.

1 THE COURT: Okay. So, you know, what? I must have missed
2 it. So we won't need to mark the chalk then if it's in there.
3 But, yeah, I'm sorry, go ahead.

4 MR. LURIE: So I guess, your Honor, you've indicated you
5 haven't read the non-state cases yet. I hope you have the
6 opportunity to do it.

7 THE COURT: Oh, I will, I will.

8 MR. O'FLAHERTY: And, you know, we acknowledge this is a
9 unique case that that it follows Smith, but there is no fact
10 pattern that we found that's similar to this one, but there are
11 legal rulings in dedication cases that I think provide guidance
12 for your Honor. And one of those is in this rainwater case which
13 is a Tennessee Appellate decision where there they found the
14 undisputed -- the facts to be largely undisputed. But
15 nevertheless they reversed summary judgment and they said, "The
16 proof on the issue of intent to dedicate must be unequivocal, but
17 intent may be inferred from surrounding facts and circumstances,
18 including the over [indiscernible-10:05:14] of the owner."

19 And if reasonable minds could justifiably reach different
20 conclusions based upon the evidence at hand, then a genuine issue
21 of fact exists.

22 Where there's any dispute regarding reasonable inferences
23 that can be drawn from the undisputed facts, summary judgment
24 motion should not be granted.

25 We find that reasonable minds justifiably could reach

1 different conclusions based upon the evidence at hand.

2 And that is why, your Honor, this does warrant a jury trial
3 consistent with Judge Foster's ruling on those -- those specific
4 issues. There is not just 53 years of use, there's not just
5 Northeastern standing by and encouraging that use for 53.
6 There's not just a pattern in 1965 of assurances given to the
7 Town upon which the Town relied. There's not just websites that
8 for a decade that confirmed that it was being treated as a
9 wildlife preserve. There's not just a 1965 proposal that
10 maintains that it's going to be treated as a wildlife preserve.
11 There's no just reliance by the Town in its development of Lodge
12 Park on the maintenance of the wildlife preserve. The totality
13 of all of that does warrant a reasonable jury could find, based
14 upon that under *Smith*, given the guidance of *Smith* that this has
15 been dedicated to public use precisely because -- I mean, you
16 know, let's be frank. Why didn't Northeastern do it? They
17 weren't just being a good citizen. They -- they had assured the
18 Town that the Town was going to have access to the beauty.

19 Now a new administration is trying to go back on that and
20 appropriate the beauty for itself. They want to build the
21 building right on top of the bunker, clear it so it, the new
22 conference center has a view north and a view west and a view
23 back to Boston, but this has been used by the public for 53
24 years. The public is entitled to those views. The public -- and
25 we're not trying to stop Northeastern's, you know, science, which

1 is a very good, you know, endeavor which they have practiced very
2 successfully at the Edwards building for 53 years now.

3 But now they want to take back something that has been
4 effectively dedicated to the public over time. That's why
5 we're --

6 THE COURT: So, you know, I have to tell you,
7 Mr. O'Flaherty, that Mr. Lurie has a point about -- so my
8 instinct initially was that the Trust and the Town pointing to
9 all these things that were in their own documents really aren't
10 helpful. That's what I was thinking because those are the Town's
11 document. It doesn't show Northeastern's intent. But, you know
12 what? I think Mr. Lurie has a point and that is that why would
13 they be saying all these things?

14 MR. O'FLAHERTY: Who, your Honor?

15 THE COURT: "They" being the "Town" in their -- in their
16 RSP, in their open space plans, et cetera, because -- hold on one
17 second. Just bear with me -- because your point, Mr. O'Flaherty,
18 about what happened in the '60s, and I agree with. I think the
19 record -- but I think that when you start looking again in the
20 light most favorable to the Town and Trust, beyond that time
21 period, why is the Town saying these things in public documents?

22 MR. O'FLAHERTY: Let me just point out one very important
23 thing that's not --

24 THE COURT: Sure.

25 MR. O'FLAHERTY: -- said by the Town in those very documents

1 that this is a public, a public wildlife preserve, a public
2 wildlife sanctuary.

3 What they say is Northeastern -- Northeastern maintains
4 their property as a wildlife sanctuary and preserve. Why does
5 Northeastern do that? For its educational purposes, your Honor.

6 It wasn't running a public park up there. And -- and the
7 Town doesn't say so. And, by the way, your Honor, whatever the
8 Town says isn't binding on Northeastern. For a dedication there
9 has to be clear, unequivocal statements by the dedicator and
10 there isn't.

11 Mr. Lurie said a minute ago, the Town relied on assurances
12 given by Northeastern, and by Northeastern standing by and
13 letting the Town say things like this. There were no trespassing
14 signs, there was security. Northeastern just didn't stand by.
15 But let me just read you one thing. This comes out of Exhibit
16 15, Page 94, the -- the annual report from 1965.

17 "The Commission was not able to secure from the Government
18 and Northeastern assurance that there would be an absolute right
19 on the part of Townspeople to walk on pathways around the cliffs.
20 The Commission does, however, hope some form of visiting
21 privilege for scenic walks may be extended."

22 There was no assurance and they knew it. And, by the way,
23 like I said before, your Honor, they didn't want that site
24 dedicated and open to the public. They wanted it to be their own
25 little private idoo. They wanted just Nahanters alone to have

1 the right.

2 The people in '65 --

3 THE COURT: So that's not enough for the public?

4 MR. O'FLAHERTY: What's that?

5 THE COURT: That's not enough for the public.

6 MR. O'FLAHERTY: Correct.

7 THE COURT: So the public has to be more -- it's got to
8 include outsiders.

9 MR. O'FLAHERTY: It's got to include -- as they said
10 themselves in their own -- their own reports, it's got to be open
11 to everybody in the United States. They didn't want that. They
12 didn't want a dedication. That would be the result of a
13 dedication.

14 THE COURT: But, again, they didn't want it in '65, but let
15 me -- Mr. Pucci, I want --

16 MR. O'FLAHERTY: They don't want it now.

17 THE COURT: What's that?

18 MR. O'FLAHERTY: They don't want it now. They won't want
19 the rest of the world coming up there.

20 THE COURT: One thing -- one thing that I am struck by and
21 my memory may be wrong, but I think that all of the evidence of
22 public use is by Nahanters, right?

23 MR. O'FLAHERTY: Correct.

24 THE COURT: Is that such a word, Nahanters?

25 MR. O'FLAHERTY: Yes, I believe. Yes. Well, it comes from,

1 you know, the members of the plaintiff group of the MPT parties.
2 That's -- that alone is not enough. Again, your Honor, as I said
3 under *Hayden* is the acceptance has to come from the public and
4 the public has to be accepting it through the authority to whom
5 the dedication is made. That would be the Commonwealth. These
6 folks don't represent the Commonwealth. And they don't want
7 people from Boston, Somerville, Chelsea, at least they didn't in
8 '65. I'll be clear about that.

9 THE COURT: Okay. All right. Mr. Pucci, what do you want
10 to say?

11 MR. PUCCI: Just a couple of quick points, your Honor.

12 THE COURT: Sure. Please.

13 MR. PUCCI: I'm obviously deferring to Attorney Lurie who
14 speaks more than well on behalf of both the Town, and then BTR
15 positions are the same. Just a few points.

16 First of all, *Smith v Westfield* that's just not the law.
17 The Commonwealth didn't have to accept the public dedication.
18 That's just contrary. That was a taxpayers action, *Smith versus*
19 *Westfield*.

20 And I just want to -- you know, the point was made the
21 second time about this path and an easement and trying to mix
22 things up, which I'd submit, you know, are purposely being mixed
23 up.

24 The pathway that counsel is referencing that the
25 Conservation Commission didn't get, quote, unquote, is like a

1 defined easement, deeded easement on the cliff area. And the
2 inference from the record is clear that that was kind of a
3 non-starter because it's just too much of a dangerous proposition
4 in terms of the rocky cliff. That is different than the path
5 that was referred to in the Asa Noelle's letter that Attorney
6 Lurie put up as the chalk, Exhibit 19. He talks specifically
7 about, "We assured them we would with the Town in the development
8 of a walkway through the property which could be used by citizens
9 and others to view the ocean and the cliffs, and this way, the
10 Town would still have the benefit of the beauty of the area and
11 Northeastern would have the benefit from a utilitarian
12 standpoint.

13 Also, in that letter --

14 THE COURT: But the problem, Mr. Pucci, with that statement
15 goes back to where we started, and that is that the property --
16 we're talking about -- we're talking about a peninsula, I
17 believe, that's 27 acres in total, right?

18 MR. O'FLAHERTY: 28.

19 THE COURT: Is that 28? Lodge Park is eight of that.

20 MR. PUCCI: Eight.

21 THE COURT: But Northeastern's is 20 of that.

22 MR. PUCCI: No. That's my point though, your Honor. That
23 was when they were acquiring the 20-acre piece because I have
24 more to say about that.

25 THE COURT: Please.

1 MR. PUCCI: And in terms of this isn't just the Conservation
2 Commission involved in the public acceptance and the public's
3 reliance on Northeastern's dedication. In that same letter from
4 Noelle's, Exhibit 19, it talks about we met with the Selectmen of
5 Nahant as well as the Planning Board of Nahant, the Advisory
6 Committee of Nahant to discuss Northeastern's acquisition.

7 There was a rising vote of welcome to Nahant, extended to
8 Northeastern by those present and officially speaking for the
9 Town. Of those official bodies that do represent the actual Town
10 of Nahant, not a stray statement that somebody may have made at a
11 town meeting back in -- at that time period.

12 So this is clearly the decision-makers of the Town, those
13 were the authority to act on behalf of the Town are supporting
14 Northeastern's acquisition of this property from the Federal
15 Government at the time based on Noelle's representation that
16 there would be public access to this preserved wildlife area.

17 Something important, your Honor --

18 THE COURT: By the Town was granted public access through
19 the right-of-way.

20 MR. PUCCI: No, your Honor. That was another thing that I'm
21 trying to clear up here.

22 THE COURT: Sure.

23 MR. PUCCI: So the path that they're talking about that's in
24 the annual report that quote we didn't get. That's an easement
25 area that they weren't granted along the cliff area because it's

1 too dangerous to think about people walking along that cliff.

2 The Town didn't get any deeded easement at the time because
3 the government still owned the eight-acre parcel which later
4 became Lodge Park. That's an easement to that eight-acre parcel
5 which ran with the property acquired by Northeastern.

6 So that's a second issue. So you've got the path, the path
7 along the cliff which didn't result in an easement, you have the
8 actual recorded certificate of title easement which runs through
9 and allows access to the eight-acre parcel through the 20-acre
10 parcel.

11 And then you have a totally separate thing that has to do
12 with the dedication which was President Noelle's representation
13 that there would be access through the property so the public
14 could enjoy that area on top of and to the east of Murphy Bunker,
15 not along the cliff, through the Northeastern property on -- on
16 that designated portion.

17 This part is really important because there's more reliance
18 and acceptance of this dedication going on at the time that also
19 had to do with the Federal Government because they could have
20 just thrown out and sold it to anybody. But what they were doing
21 is they're trying to examine a way that this property can be
22 conveyed and used, you know, to support like public purposes.
23 And you have to make the case to the Federal Government to
24 acquire those -- those parcels for that reason.

25 And, you know, one additional statement back at that time by

1 Northeastern now, not the Town reflecting what Northeastern was
2 saying, was when the later the piece from the Federal Government
3 for the eight acres that later became Lodge Park, they put that
4 up at that time, and then Northeastern and the Town were sort've
5 competing then for that parcel. And this is in the record.

6 At that time, Northeastern represented to the Federal
7 Government -- and this is in Exhibit 32 -- if given control of
8 both sites -- now they're saying the 20 acres they have and the
9 eight acres that later became Lodge Park, Northeastern will
10 request that the entire area be designated a marine wildlife
11 preserve.

12 So they're making the representation about preservation of
13 this parcel as a wildlife preserve, they made it in 1965 to get
14 the 20 acres, they're making it again, your Honor, in 1970.

15 THE COURT: Perhaps for educational purposes, not for public
16 use?

17 MR. PUCCI: Well, that -- so that leaves me to the final
18 point that I just -- you know, you can tell on my face, I just
19 wanted to make a couple points to your Honor today in addition to
20 Attorney Lurie's very able presentation.

21 The "*Smith versus Westfield*" case stands for a lot. There's
22 a lot in there. And Justice Gans granted that case.

23 I had a public dedication case involving the MBTA and
24 Eversource project that Judge Gans, Justice Gans heard and then
25 he, unfortunately, passed away by the time the decision came

1 down, but there's a lot of meat in the *Smith v Westfield* decision
2 by Justice Gans.

3 And we've been focusing in response to your Honor's
4 questions about dedication plus public use. There's clearly
5 evidence sufficient in the record and inferences have to go to
6 the party opposing summary judgment that there should be a jury
7 trial on the issue of dedication plus public use and acceptance
8 through the public use.

9 There's also statements. And this is why I'm harping on
10 Justice Gans and *Smith versus Westfield*, his analysis was it is
11 going to make history for Massachusetts really in terms of
12 developing law with regard to preservation of parcels that are
13 for conservation or natural resource protection.

14 And other statements in that decision is you can -- first of
15 all, it's the totality of the circumstances. And here this
16 voluminous record shows a totality of the circumstances
17 supporting the Town's claim.

18 The other element that can occur, your Honor, is whether a
19 parcel was "designated" by that property owner or the one to
20 acquire it for conservation purposes of preservation purposes in
21 a manner sufficient to invoke the protection of Article 97.

22 So what you're talking about is conduct or designation of a
23 parcel to impose restrictions, just like in law school with a
24 bundle of sticks. So a property interest is a bundle of sticks.

25 That -- this -- this imposition through Article 97 is a -- a

1 restriction that goes onto that property. There can be certain
2 restricted uses within that land that then is also protected by
3 Article 97, and that that point is made clear in *Smith versus*
4 *Westfield*.

5 THE COURT: So, in other words, the public use doesn't need
6 to be exclusive?

7 MR. PUCCI: Exactly, your Honor. You can have restrictions
8 on it and still have Article 97 protection for the natural
9 resource protection.

10 And it's very clear here that this land was designated by
11 Northeastern to be preserved as a wildlife preserve. That
12 doesn't mean that -- and -- and where it goes to Northeastern's
13 ability to use their own property, which nobody is contesting,
14 that means that Northeastern can entirely appropriately stop the
15 public from interfering with their educational purposes or
16 ongoing research or stay-out of this particular planted area
17 where we're doing X, Y, Z testing. Stay out of here because
18 we're trying to see what, you know, mammals creep up from the
19 ocean or whatever it may be. They can impose restrictions that
20 are consistent with the imposition to preserve that parcel in
21 perpetuity as a wildlife preserve that's consistent with their
22 educational use.

23 So that's entirely held under *Smith versus Westfield* that
24 you can have versus a "dedication," you can have designation of a
25 portion of your parcel, but then results in Article 97 imposing

1 restrictions upon you that you can't go beyond.

2 So, in other words, Northeastern can use that parcel
3 consistent with their educational purpose with regard to the
4 extent they need that wildlife preserve, but they can't do
5 something that's inconsistent with maintaining it as a wildlife
6 preserve such as clear-cutting it and building upon it.

7 And I need to point out to your Honor, you know, this action
8 is really -- it's an action for injunctive relief. We're not
9 seeking anything on the deed. The deed has nothing to do with
10 it. The certificate of title has nothing to do with it. That's
11 clear in *Smith versus Westfield*. They specifically said --

12 THE COURT: But it does have to do with intent, right?

13 MR. PUCCI: No.

14 THE COURT: It can be evidence of --

15 MR. PUCCI: It can be, but *Smith* specifically held you don't
16 have to have it in the deed.

17 THE COURT: Yeah, but that's -- I agree with you that that's
18 what *Smith* says, and I agree with you that it doesn't need to be
19 in the deed, but the point is that I'm taking from Mr. O'Flaherty
20 is that because this is registered land, one of the ways in which
21 the Town could have shown an inference of intent was making a
22 claim through the Land Court of an encumbrance and --

23 MR. PUCCI: Right.

24 THE COURT: -- and then have the encumbrance put on the
25 site.

1 MR. PUCCI: That certainly could have been done. That
2 assumes an awful lot, your Honor. And as -- you know, this is
3 something that occurs sometimes something --

4 THE COURT: I don't know if it does assume an awful lot.

5 MR. PUCCI: Well, it assumes that somebody was thinking
6 ahead that "Hey, we better put something on this and pursue it."

7 THE COURT: But they were thinking ahead in the '70s when
8 "they" being you folks were thinking ahead in the '70s. And
9 that's, by the way, isn't that what the Town administration gets
10 paid to do is to think ahead -- but --

11 MR. PUCCI: Well, they did do the best they could at the
12 time because the Federal Government specifically pointed out when
13 they were talking about the competing interest. The Town was
14 saying at the time "We need open space. We need this parcel for
15 a pass of recreation and open space."

16 The government specifically found at the time, yes, I agree
17 the Town -- the Town is so limited in its open space, they have
18 it -- and, by the way, Northeastern is more than fulfilled for
19 their purposes where they have the adjoining pass of recreation
20 and wildlife preserve. So we don't need to deed the eight acres
21 to Northeastern. We can deed that to the Town at the time.

22 So the Town was actively taking steps even back in 1970 that
23 based on Northeastern's assurances and preservation of the
24 wildlife preserve, okay, now we're talking about the whole of
25 East Point and we're going to maintain this as a consistent open

1 space area.

2 My final point, your Honor, about --

3 THE COURT: We're going to have to wrap up in a minute or
4 two.

5 MR. PUCCI: -- *Smith versus Westfield*, my final point, your
6 Honor, is in that decision, it talked about Justice Milkey's
7 concurring decision on the underlying of an Appeals Court
8 decision which was overruled.

9 And what Judge Milkey pointed out was the reason for this
10 evolving law on Article 97 and imposing restrictions where the
11 party didn't expressly put restrictions or put them in the deed
12 is that it insulates dedicated land to short-term political
13 pressures.

14 And that's what's happening here. Northeastern goes through
15 a lot of links to say "Oh, the Town never mentioned anything
16 about public dedication until we started clear-cutting it in
17 trying to building 55,000 square foot building on it.

18 Well, of course, they didn't because they relied on it all
19 these years.

20 We gave you the affidavit of Selectman Canty about his
21 efforts to develop Lodge Park consistent with the way
22 Northeastern had maintained the wildlife preserve. This --

23 THE COURT: I need to -- I'm going to need to cut you off.

24 MR. PUCCI: Well, your Honor --

25 THE COURT: So hold on. Let me --

1 MR. PUCCI: This is the --

2 THE COURT: Hold on, hold on.

3 MR. PUCCI: Yes, sure.

4 THE COURT: Let me do this: Just, and again, I apologize
5 for cutting you off. I apologize for -- for not giving the time
6 that I originally set, but I do have a jury waiting and I don't
7 want to keep them waiting.

8 So, here's the thing is this -- do you folks need -- think
9 that you need more time for your oral arguments because if you
10 do, I'll have you work with either Mr. Mahahr [phonetic] or
11 Miss Paton and we'll put it on for further arguments. I don't
12 want to -- you know, I want you folks -- you've worked hard on
13 this issue, and I want you folks to feel as though you've been
14 able to say what you're able to say. And I know Mr. Pucci hasn't
15 been able to because I've now cut him off. So, you know, I guess
16 -- what's your sense? Would you like some more time?

17 MR. LURIE: I think we're good, your Honor. Do you have
18 more questions that you would like to direct to us? We're happy
19 to address them, but I think you've got it.

20 THE COURT: Well, I cut you off though, Mr. Pucci.

21 MR. PUCCI: No, no, but I feel the same way, your Honor,
22 because really I had nothing to add to Attorney Lurie other than
23 to point out that there's a lot in *Smith versus Westfield* that
24 compels denial of summary judgment.

25 So if you're satisfied on that point, I certainly don't need

1 more time. You know, you've got everything before you.

2 THE COURT: Mr. O'Flaherty, do you think that you would need
3 more time?

4 MR. O'FLAHERTY: Thank you, your Honor. No. Even though
5 it's two against one here, I -- I think, your Honor, right where
6 Mr. Lurie is which is if you have questions and you want us to
7 come back, we're at your disposal, but, otherwise, I'm happy to
8 rest of what happened here today on our papers.

9 MR. PUCCI: All right. Your Honor, I hate to say this --
10 and don't hate me for it --

11 THE COURT: Is it going to take more than 30 seconds?

12 MR. PUCCI: No, it's going to take ten seconds. The view
13 was originally my idea, and we thought about it. If -- you might
14 think that a view might be useful and I just wanted to throw that
15 out to you because we certainly wouldn't have to have more
16 argument on that and you could schedule it for a time that's
17 convenient for you and the parties.

18 THE COURT: Right. Yeah. I'm still -- I'm not feeling as
19 though I need a view now, but when I start rolling my sleeves up,
20 and if I feel as though I need more oral argument, I'll have
21 Miss Paton reach out to your folks. We'll schedule that. And
22 thank you very much for your hard work on this.

23 MR. O'FLAHERTY: Thank you, your Honor.

24 MR. LURIE: Thank you.

25 THE COURT: Actually, no. That's fine. All right. We'll

1 stand in recess.

2 THE COURT OFFICER: All rise.

3 (Case concluded at 10:28 a.m.)

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